Supreme Court, U. S.
FILED
DEC 11 1979
MICHAEL RODAK, JR., CLERK

No. 79 —

IN THE

Supreme Court of the United States

October Term, 1979

79-907

LAWRENCE B. INGRAM, Secretary,
Department of Human Services of
New Mexico,

Petitioner,

v.

JACQUELINE NOLAN, *et al,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JEFF BINGAMAN
Attorney General of New Mexico

ROBERT N. HILGENDORF
Deputy Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

GORDON L. BERGMAN
Assistant Attorney General
Post Office Box 2348
Santa Fe, New Mexico 87501
(505) 827-2305

Attorneys for Petitioners

December 11, 1979

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 3

STATEMENT OF THE CASE 7

A. Synopsis 7

B. The Factual Background 7

C. Proceedings in the Courts Below 8

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 14

APPENDICES

Appendix A, judgment of the U.S. District Court . . 1a

Appendix B, opinion of the U.S. District Court . . . 3a

Appendix C, opinion of the Tenth Circuit 7a

Appendix D, judgment of the Tenth Circuit . . . 12a

Appendix E, order extending time 13a

Appendix F, other statutory provisions 14a

TABLE OF CITATIONS

Cases: **Page**

Barela v. New Mexico Department of Human Services,
Court of Appeals for New Mexico, No. 4059 14

Doe v. Beal,
523 F.2d 611 (3rd Cir. 1975), reversed on other grounds 432 U.S. 439 12

Duran v. New Mexico Department of Human Services,
Court of Appeals for New Mexico, No. 4350 14

Fry v. United States,
421 U.S. 542 (1975) 13, 14

Harper v. New Mexico Department of Human Services,
Court of Appeals for New Mexico, No. 4392 14

Hisquierdo v. Hisquierdo,
____U.S.____, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) 12, 14

Hopkins v. Bacon,
282 U.S. 122 (1930) 10

Hughes v. Hughes,
91 N.M. 339, 573 P.2d 1194 (1978) 9, 10

King v. Smith,
392 U.S. 309 (1968) 11, 12, 14

Lewis v. Martin,
397 U.S. 552 (1970) 11, 14

Merrill Lynch, Pierce, Fenner & Smith v. Ware,
414 U.S. 117 (1973) 13, 14

Poe v. Seaborn,
282 U.S. 101 (1930) 10, 11, 14

Render v. Pfaff,
282 U.S. 127 (1930) 10

United States v. Yazell,
382 U.S. 341 (1966) 10, 11, 12, 13, 14

Constitutional Provisions: **Page**

United States Constitution, Tenth Amendment 3, 13
United States Constitution, Article VI, Clause 2 . . . . 7, 8

Federal Statutes and Regulations:

Railroad Retirement Act of 1974, 88 Stat. 1305 12
28 U.S.C. §1254(1) 2
28 U.S.C. §1291 8
28 U.S.C. §1331 8
28 U.S.C. §1343 8
28 U.S.C. §2201 8
42 U.S.C. §601 . . . . . 6, 12, 14a
42 U.S.C. §602(a) 7, 8
42 U.S.C. §602 (a) (7) 6, 9
42 U.S.C. §1983 8
45 C.F.R. §233.20 (a) (3) (ii) 4, 5, 9
45 C.F.R. §233.20 (a) (3) (ii) (D) 5, 11
45 C.F.R. §233.20 (a) (3) (vi) 5, 9
45 C.F.R. §233.90 (a) 5, 6, 7, 8, 9

State Statutes and Regulations:

Laws of New Mexico of 1977, Chapter 252 1
New Mexico Community Property Act of 1973 . . . 6, 14a
New Mexico Declaratory Judgment Act 6, 10, 19a
§40-3-9 N.M.S.A. 1978 10
§40-3-11.A. N.M.S.A. 1978 10
§40-3-14 N.M.S.A. 1978 10
H.S.S.D. Manual §221.832 . . . . . 2, 3, 4
H.S.S.D. Manual §221.832.1.b 4, 9

IN THE

Supreme Court of the United States

October Term, 1979

No. 79 –

STATE OF NEW MEXICO and
FERNANDO C. de BACA,
Executive Director, Department of
Health and Social Services,
Petitioners,

v.

JACQUELINE NOLAN, *et al,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of New Mexico and its Executive Director of the Department of Health and Social Services[1] petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Judgment (App. A, pp. 1a-2a) and Opinion (App. B, pp. 3a-6a) entered in this case by the United States District

1. Due to State reorganization, the petitioning department is now known as the Department of Human Services, pursuant to the Laws of New Mexico of 1977, Chapter 252. The present head of the department is Secretary Lawrence B. Ingram.

Court for the District of New Mexico on November 28, 1977 are unreported. The Opinion of the United States Court of Appeals for the Tenth Circuit (App. C, pp. 7a-11a) is reported at 603 F. 2d 810 (1979).

JURISDICTION

The Opinion and Judgment (App. D, p. 12a) of the United States Court of Appeals for the Tenth Circuit were filed on August 13, 1979. By order of October 29, 1979 Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including December 11, 1979 (App. E, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. As a matter of New Mexico community property law, is community income, in the form of a paycheck made payable to the nominal wage earner and in the form of a G.I. Bill educational benefits check made payable to the nominally entitled veteran, the separate property of the spouse who nominally earned it, or does it belong equally to the members of the marital community?

2. Does H.S.S.D. Manual § 221.832, the State's regulation relating to the income of an applicant for AFDC benefits, conform to the principles of the State's community property law?

3. If, under State AFDC regulations which conform to State law, one-half of the community income belongs to the non-wage earning wife, do any federal statutes or regulations prohibit the State from counting her half-share of the community income in determining her children's eligibility for AFDC benefits?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment X

Amendment X to the Constitution of the United States provides that:

> *[Powers Reserved to States or People]*
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

H.S.S.D. Manual §221.832

H.S.S.D. Manual §221.832, of the New Mexico Health and Social Services Department Manual of Regulations, provides in pertinent part:

> 1. *Availability of income* – In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. For purposes of this section an individual is considered a household member under the following circumstances: . . .
>
> a. *Division of Income between Spouses* – In keeping with the State's community property law, one half (½) the community property income of spouses is considered available to each spouse when they live together. The separate income of a spouse is considered available only to that spouse. . . . All income is considered as community property income unless the client can

demonstrate to the worker's satisfaction that it is separate income. . . .

b. *Income of a Parent* – The income of a parent (or the parent's share of income) is considered available to the AFDC budget group which includes the parent's children under age 21 when the parent and children live together. The amount of income so available is the amount that remains after deduction of the maintenance allowances described in paragraph C below.

* * *

45 C.F.R. §233.20 (a)(3)(ii)

45 C.F.R. §233.20 (a)(3)(ii), set forth at pp. 165-167 of volume 45 C.F.R. 201.0, revised as of October 1, 1978, provides in pertinent part:

(a) . . . A State Plan for . . . AFDC . . . must, as specified below:

(3) . . .

(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:

(A) in determining need all remaining income and resources shall be considered in relation to the State's need standard;

(B) in determining financial eligibility and the amount of the assistance payment, all remaining income . . .

. . . and all resources may, at the State's option, be considered in relation to the State's need standard, or the State's payment standard.

* * *

(D) net income available for current use and currently available resources shall be considered; *income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance;*

(E) income and resources will be reasonably evaluated.

(emphasis added).

45 C.F.R. §233.20 (a)(3)(vi)

45 C.F.R. §233.20 (a)(3)(vi), set forth at p. 167 of volume 45 C.F.R. 201.0, revised as of October 1, 1978, provides in pertinent part:

(vi) . . . if the State agency hold relatives responsible for the support of applicants and recipients, . . . [i]n family groups living together, . . . *income of a parent is considered available for children under 21* . . .

(emphasis added).

45 C.F.R. §233.90 (a)

45 C.F.R. §233.90 (a), set forth at pp. 177-178 of volume 45 C.F.R. 201.0 revised as of October 1, 1978, provides in pertinent part:

(a) . . . A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent, who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support

the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

42 U.S.C. §602 (a)(7)

42 U.S.C. §602 (a)(7), appearing at p. 636 of U.S.C. 1976 ed. Vol. 10, provides in pertinent part:

> (a) A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, ...

Other Provisions

42 U.S.C. §601 and pertinent provisions of the New Mexico Community Property Act of 1973 and the New Mexico Declaratory Judgment Act are set forth in Appendix F, pp. 14a *et seq.*

STATEMENT OF THE CASE

A. Synopsis

This appeal raises the issue of preemption of a state regulation for the Aid to Families with Dependent Children (AFDC) program by federal statutes and regulations. Mrs. Nolan brought suit to enjoin New Mexico's Health and Social Services Department from enforcing the provisions of a department regulation which sought to apply some of New Mexico's community property law concepts to the AFDC program (R. Vol. I, p. 1). The trial court found the state community property regulation conflicted with 42 U.S.C. §602 (a), and the implementing regulation, 45 C.F.R. §233.90 (a), and granted summary judgment to Mrs. Nolan on the basis of the Supremacy Clause of the Constitution (R. Vol. I, p. 165). The department appealed to the Tenth Circuit, which affirmed (R. Vol. I, p. 169).

B. The Factual Background

The facts were stipulated to the District Court (R. Vol. I, p. 103). Mrs. Nolan resides in New Mexico with her husband and her three children by a previous marriage. Mr. Nolan has not adopted the children and under New Mexico law is not legally obligated to support them (R. Vol. I, pp. 103, 107).

Mrs. Nolan is an unemployed, full-time student at the University of New Mexico. She receives no wages nor paychecks made expressly payable to her as payee or co-payee (R. Vol. I, p. 104).

Mr. Nolan is also a full-time student at the University. He draws G.I. Bill income and receives income in the form of wages as a part-time employee (R. Vol. I, pp. 104, 124).

Under the State's community property regulation at issue herein, the children of Mrs. Nolan receive $2.00 a month and

qualify for medicaid benefits. The regulation counts one-half of the net amount of the checks made payable to Mr. Nolan as the income of Mrs. Nolan, which in turn is considered available for her support of her children (R. Vol. I, pp. 103, 105-106, 160).

C. Proceedings in the Courts Below

Invoking the jurisdiction of the United States District Court under 28 U.S.C. §§1331 and 1343 for claims alleged under 42 U.S.C. §1983 and 28 U.S.C. §2201, Mrs. Nolan challenged the validity of the department's community property regulation. She alleged in Count 1 of her complaint that the department's regulation conflicted with 42 U.S.C. §602 (a) and 45 C.F.R. §233.90 (a) and thus violated the supremacy clause of the United States Constitution (R. Vol. I, pp. 1-3).

The District Court granted summary judgment to Mrs. Nolan on count one, ruling that the State's regulation conflicted with 42 U.S.C. §602 (a) and 45 C.F.R. §233.90 (a) and was preempted under the supremacy clause (R. Vol. I, pp. 78, 159, 163).

The department appealed the decision, under 28 U.S.C. §1291, to the Tenth Circuit, which affirmed the district court (R. Vol. I, p. 169).

REASONS FOR GRANTING THE PETITION

The Court below has jeopardized New Mexico's ability to manage its welfare programs consistently with its community property laws, by striking down a valid AFDC income regulation of New Mexico's which is based on those laws and which is not in conflict with the United States Constitution, federal statutes, or federal regulations.

New Mexico's treatment of community income as income for AFDC purposes is not only consistent with, but mandated by,

federal statutes and regulations which require a State to consider as available all net income and resources of the applicant parent.

To illustrate, 42 U.S.C. §602 (a)(7), set forth *supra*, requires the State to take into account *any* income of the child or applicant parent, other than certain exceptions not relevant here. This statutory dictate is carried into the federal regulations. For instance, 45 C.F.R. §233.20 (a)(3)(ii), set forth *supra*, states that a State shall consider all net income and resources of the applicant both when actually available and when the applicant *has the legal ability to reach a liquidated sum.*

Also, 45 C.F.R. §233.20 (a)(3)(vi), set forth *supra*, notes that income of a parent is considered available for children under 21. Compare: H.S.S.D. Manual §221.832.1.b., set forth *supra.* Last of all, 45 C.F.R. §233.90 (a), set forth *supra*, requires that the income of an applicant child's parent will be considered available.

Thus, the latter federal regulation, far from defeating New Mexico's regulation as viewed by the opinions below, mandates it. For New Mexico's regulation focuses not on the stepparent Mr. Nolan's one-half share of the community income, which would clearly be forbidden. Rather, it focuses properly on the mother Mrs. Nolan's income, that is, on her one-half share of the community income.

The impact of this federal mandate on New Mexico can be gleaned from examining the State's property and marital law. Under settled New Mexico law, Mrs. Nolan has income. Her income consists of one-half of the community income she and her husband receive, that is, the wages and G.I. Bill benefits made payable to him. These wages and benefits are not his separate income as they would be characterized generally in separate property jurisdictions. Furthermore, her interest is

present and vested. *Hughes v. Hughes,* 91 N.M. 339, 573 P. 2d 1194 (1978).

This Court has recognized this substantive property concept which distinguishes the eight community property States from the other States. See *Poe v. Seaborn,* 282 U.S. 101 (1930); *Render v. Pfaff,* 282 U.S. 127 (1930); *Hopkins v. Bacon,* 282 U.S. 122 (1930); *United States v. Yazell,* 382 U.S. 341 (1966).

As owner of one-half of the community income, Mrs. Nolan has "title" to her income. Under New Mexico law, it is arguable that her husband as payee of the checks constituting their community income has sole management control over the entire community income. See §40-3-14 N.M.S.A. 1978, App. F, *infra,* at pp. 18a-19a.

However, such an argument is empty. Under §40-3-9 N.M.S.A. 1978, App. F, at p. 16a, Mrs. Nolan may encumber the community income by making credit purchases. Note the provision of §40-3-11.A. N.M.S.A. 1978, App. F, at p. 17a, as to priorities for satisfaction of community debts. Furthermore, under the New Mexico Declaratory Judgment Act, App. F, at pp. 19a-21a, Mrs. Nolan may obtain declaratory, injunctive relief if necessary to enforce her community income rights.

This Court in *Poe v. Seaborn* has affirmed the above points:

> The obligations of the husband as agent of the community are no less real because the policy of the state limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. *The laws's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner.*
>
> We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could

> rightly be termed that of the wife. (282 U.S. at 113) (emphasis added).

Accordingly, Mrs. Nolan has income which the federal statutory and regulatory provisions allow, indeed compel, New Mexico to count for AFDC purposes. Certainly they do not constitute "clear and substantial interests" of the federal government which "will suffer major damage if the state law is applied." See *United States v. Yazell, supra,* at 352.

For it is clear from the above that Mrs. Nolan through her community income property rights either has income that is "actually available" or "has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance" of the children. See 45 CFR §233.20 (a) (3) (ii) (D) *supra.*

The Courts below ignored these points and thus misunderstood the basic nature of this case. This case is not a so-called "stepparent case" such as *Lewis v. Martin,* 397 U.S. 552 (1070) nor a "man-in-the-home case" such as *King v. Smith,* 392 U.S. 309 (1968). It is an *income* case. Thus, the cases cited by them as authority are not in point.

For example, *King v. Smith* did not deal with community property issues at all. *Lewis v. Martin* contained no language addressing any issue of community property or income. Although this Court's comments in *King* and *Lewis* that "Congress expected 'breadwinners' who secured employment would support their children", 392 U.S. at 328-330, 397 U.S. at 557-559, seem well-taken in the context of those two cases, they are not applicable to the instant case. Accordingly, *King* and *Lewis* should not be extended to this case.

For it is not enough to say that "Congress expected 'breadwinners' who secured employment would support their children" unless Congress actually and clearly intended to exclude

all income attributable to a natural parent from sources other then "employment". The petitioner, State of New Mexico, does not believe that is the case. In community property jurisdictions "breadwinners" are not the only persons who receive an income.

Hisquierdo v. Hisquierdo, ____U.S.____, 99 S. Ct. 802, 59 L.Ed. 2d 1 (1979), was also cited as authority by the Tenth Circuit Court of Appeals in their opinion below. *Hisquierdo* addressed the issue of community income only in the context of the Railroad Retirement Act of 1974, 88 Stat. 1305. The controlling aspect of *Hisquierdo* was the specific anti-attachment provision, § 231, of the Railroad Retirement Act. See *Hisquierdo* at 59 L.Ed. 2d 12. No such special language, statutory or otherwise, is present in the instant case.

Hisquierdo is distinguishable further. Whereas the Hisquierdo decision "prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of congressional policy", such a prophylactic consideration is inapplicable here. *Hisquierdo,* at 59 L.Ed. 2d 12. For Congress has expressly limited AFDC assistance in each State to the extent "as far as practical under the conditions in such State". 42 U.S.C. §601, *supra.* Although the States do not have unlimited state discretion in the AFDC scheme of cooperative federalism, nonetheless "[t]here is no question that States have considerable latitude in allocating their AFDC resources." *King v. Smith,* 392 U.S. 309, 318 (1968). Compare: *Doe v. Beal,* 523 F.2d 611 (3rd Cir. 1975), reversed on other grounds, 432 U.S. 439.

Furthermore, in *Yazell, supra,* this Court noted that:

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the Courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied . . .
>
> This Court's decisions applying "federal law" to supercede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation.
>
> None of these cases overrode state law in *the peculiarly state province of family or family-property arrangements.* 382 U.S. at 352-354. (emphasis added).

Finally, under the Tenth Amendment to the Constitution of the United States, the New Mexico regulation at issue herein should be construed to be valid. For this Court has recognized that under the Tenth Amendment "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States,* 421 U.S. 542, 547, note 7 (1975). The petitioner suggests that here, as in *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 127 (1973), "the sensitive interrelationship between . . . federal and state sovereignties should not be overlooked, and "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' "

We cite the above Tenth Amendment principles not primarily to challenge the constitutionality of any federal statute or regulation, but principally to underscore the serious breach of State sovereignty posed by the decisions below. For if the Courts below had followed the Tenth Amendment caveats of *Fry* and *Merrill Lynch,* they would have upheld New Mexico's regulation by construing the relevant federal and state statutes and regulations as a harmonious whole.

CONCLUSION

The opinions below are seriously in error. They conflict in principle with this Court's decisions in *United States v. Yazell, Poe v. Seaborn, Fry v. United States,* and *Merrill Lynch, Pierce, Fenner & Smith v. Ware, supra,* and represent an unwarranted extension of *King v. Smith, Lewis v. Martin,* and *Hisquierdo v. Hisquierdo, supra.*

The issues in this case have not been decided before in any reported case.[2] The Court should accept this case for these reasons and because of the importance of New Mexico's right, in the absence of clearly conflicting federal interests, to govern

2. Three State cases with the same legal issues as the instant case are presently pending in the appellate courts of New Mexico: *Carmen Barela v. New Mexico Department of Human Services, Income Support Division,* No. 4059, Court of Appeals of New Mexico; *Isabel Duran v. New Mexico Department of Human Services, Income Support Division,* No. 4350, Court of Appeals of New Mexico; and *Lisa Harper v. New Mexico Department of Human Services, Income Support Division,* No. 4392, Court of Appeals of New Mexico. In the Barela case, the Court of Appeals ruled against the department on October 30, 1979 and denied a motion for rehearing on November 13, 1979. At the time of printing of this petition herein, the department intends to file by December 3, 1979 with the New Mexico Supreme Court a petition for writ of certiorari, in the Barela case. In the Duran case, notice of appeal was filed on October 25, 1979, with no briefs having been filed so far. In the Harper case, notice of appeal was filed on November 28, 1979, with no briefs having been filed so far.

its marital and property relationships free from unwarranted federal intrusion.

Respectfully submitted,

JEFF BINGAMAN
Attorney General of New Mexico

ROBERT N. HILGENDORF
Deputy Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

GORDON L. BERGMAN
Assistant Attorney General
Post Office Box 2348
Santa Fe, New Mexico 87501
(505) 827-2305

Attorneys for Petitioners

December 11, 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

November 28, 1977

JACQUELINE NOLAN, on Behalf of Herself and on Behalf of Her Minor Children, DANIEL SCHMITZ, DEBORAH SCHMITZ and DWAYNE SCHMITZ,

Plaintiff,

vs. No. 76-612-B Civil

FERNANDO C. de BACA, Individually and as Executive Director, New Mexico Department of Health and Social Services,

Defendant.

JUDGMENT

This matter having come on for consideration upon the Motion of plaintiff Jacqueline Nalan [*sic*] for summary judgment on Count One of her complaint in which she claims that H.S.S.D. Manual § 221.832 – B.l conflicts with the provisions of 42 U.S.C. § 602(a) and 45 C.F.R. § 233.90(a), and thus violates U. S. Const. art. VI, cl. 2; and the Court having filed herein its Memorandum Opinion finding that plaintiff is entitled to summary judgment on Count One of her complaint as a matter of law; Now, Therefore,

IT IS DECLARED AND ADJUDGED that Health and Social Services Department Manual § 221.832 – B. 1 conflicts with the provisions of 42 U.S.C. § 602(a) and 45 C.F.R. § 233.90(a) and thereby violates article VI, clause 2, of the United States Constitution.

IT IS THE FURTHER ORDER OF THE COURT that the defendant Fernando C. de Baca, individually and as Executive Director of the New Mexico Department of Health and Social Services, and his agents, employees, and representatives be, and they hereby are, permanently enjoined from enforcing Health and Social Services Department Manual § 221.832 – B.1 as against plaintiff Jacqueline Nolan and her three minor children Daniel Schmitz, Deborah Schmitz and Dwayne Schmitz.

IT IS THE FURTHER ORDER that each side bear its own costs of action.

/s/ Howard C. Bratton
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

November 28, 1977

JACQUELINE NOLAN, on Behalf of Herself and on Behalf of Her Minor Children, DANIEL SCHMITZ, DEBORAH SCHMITZ and DWAYNE SCHMITZ,

Plaintiff,

vs. No. 76-612-B Civil

FERNANDO C. de BACA, Individually and as Executive Director, New Mexico Department of Health and Social Services,

Defendant.

MEMORANDUM OPINION

This matter is before the Court upon the plaintiff's motion for summary judgment on Count One of her complaint. In that count it is alleged that a regulation of the New Mexico Health and Social Services Department [hereinafter H.S.S.D.] conflicts with provisions of the Social Security Act, 42 U.S.C. § 602(a), and regulations promulgated thereunder, particularly 45 C.F.R. § 233.90(a), and thus violates the supremacy clause of the United States Constitution.

The facts material to a resulution [*sic*] of this issue are not in dispute and are as follows.

The plaintiff has three minor children, living with her and her present husband. Her present husband has not adopted the children and, under the laws of New Mexico, is not legally

obligated to support them. Plaintiff is a full-time student at the University of New Mexico and has no independent income. Her husband, who is also a full-time student at the University, draws G. I. bill income and earns other income as a part-time worker at a local lumber company.

The natural father of the three children lives outside the state of New Mexico and has not provided any support for them, so that, since 1971, plaintiff has been receiving income assistance for her three children pursuant to the Aid to Families with Dependent Children [hereinafter A.F.D.C.] administered by the defendant director of H.S.S.D.

In October of 1976, H.S.S.D. notified plaintiff A.F.D.C. assistance to her three children was being reduced from $163.00 per month, the amount then being received, to $2.00 per month. The basis for the reduction was the operation of a new H.S.S.D. regulation,[1] under which one-half of the

---

[1] H.S.S.D. Manual § 221.832 – B.1 provides:

1. **Availability of income** – In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. For purposes of this section an individual is considered a household member under the following circumstances: . . .

a. **Division of Income between Spouses** – In keeping with the State's community property law, one half (1/2) the community property income of spouses is considered available to each spouse when they live together. The separate income of a spouse is considered available only to that spouse. "Separate income" is income (1) that is derived from property acquired before marriage and not since converted to community property or (2) that is kept separate by one spouse and is not used to meet common expenses or debts of both spouses. All income is considered as community property income unless the client can demonstrate to the worker's satisfaction that it is separate income . . . .

b. **Income of a Parent** – The income of a parent (or the parent's share of income) is considered available to the AFDC budget group which includes the parent's children under age 21 when the parent and children live together. The amount of income so available is the amount that remains after deduction of the maintenance allowances described in paragraph e below. . . .

community property income of spouses is considered available to each spouse when they live together. In essence, H.S.S.D. attributed one-half of the net income of plaintiff's husband to her, and, after deducting from this sum an allowance for her support, attributed the balance as available to meet the needs of her three children. When this sum was subtracted from the figure representing the defendant's dollar determination of the children's needs, and the percentage of those needs which would be met by H.S.S.D. was applied, the assistance grant was $2.00.

This entire procedure was conducted without inquiry into whether the plaintiff's husband was in fact making any of the income he received available to the three children.

Section 602(a) of the Social Security Act provides the pertinent guidelines under which states must determine the need of a child in whose behalf aid is being claimed, and the provisions of Section 233.90 of Title 45 of the Code of Federal Regulations detail the specific requirements to be considered. Section 233.90 requires that a state determination of whether a child is eligible for benefits must be made by considering only the income of the child's natural or adoptive parent, or of a person married to the child's natural or adoptive parent who is legally obligated under state law to support the child to the same extent as would a natural or adoptive parent. That section further provides that the presence of any other individual in the family or household may not be used to assume that any of that person's income is available to the child, in the absence of proof of actual contributions by such person.

When the state regulation is assessed under the criteria set forth in Section 233.90, it is clear that the state's regulation contravenes its provisions and those of the Social Security Act. It is agreed in the present action that the income in question

is that of plaintiff's husband, that he has not adopted plaintiff's three children, and that he has no obligation under state law to support them. The assumption that New Mexico's community property laws may give plaintiff an interest of some kind in his income is not sufficient to bring the regulation into compliance with the federal requirements. It does not rise to the level of a state law requiring a non-adopting stepfather to support his stepchildren to the same extent that natural or adoptive parents are required to support their children. This is what is required by Section 233.90 in order to consider his income as available to the children in any regard, and, in its absence, the state may look to the income of plaintiff's husband as a means of reducing benefits to her children only where he has made actual contributions to their support from it. *Lewis v. Martin,* 397 U.S. 552 (1970); *Reyna v. Vowell,* 470 F.2d 494, 466 (5th Cir. 1972); *Woods v. Miller,* 318 F.Supp. 510 (W.D.Pa. 1970). The state regulation admittedly operates without inquiry into such factual data.

In view of the above conclusion, it is unnecessary to further consider the plaintiff's other challenges to the regulation. Accordingly, the regulation will be declared to be in violation of 42 U.S.C.A. § 602(a) and the regulations promulgated pursuant thereto and its enforcement against the plaintiff's three minor children will be permanently enjoined.

/s/ Howard C. Bratton
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 13, 1979

JACQUELINE NOLAN, on behalf of herself
and on behalf of her minor children,
DANIEL SCHMITZ, DEBORAH SCHMITZ and
DWAYNE SCHMITZ,
Plaintiff-Appellee,

vs.

No 78-1061

FERNANDO C. de BACA, individually and
as Executive Director, New Mexico
Department of Health and Social Services,
Defendant-Appellant.

Per Curiam.

This appeal raises the issue of preemption of a state regulation for the Aid to Families with Dependent Children (AFDC) program by a federal statute and regulation. The plaintiff brought suit to enjoin New Mexico's Health and Social Services Department from enforcing the provisions of a Department regulation which sought to apply some of New Mexico's community property law concepts to the AFDC program. The trial court found the state community property regulation conflicted with 42 U.S.C. § 602(a), and the implementing regulation, 45 C.F.R. § 233.90(a), and granted summary judgment to the plaintiff on the basis of the Supremacy Clause of the Constitution.

The facts were stipulated to the court. Mrs. Nolan resides in New Mexico with her husband and her three children by a previous marriage. Mr. Nolan has not adopted the children, and

under New Mexico law is not legally obligated to support them. Mrs. Nolan is an unemployed full-time student at the University of New Mexico. She has no income of her own and does not receive child support payments from the natural father. Mr. Nolan is also a full-time student at the University, but he works part time. He does not voluntarily or regularly provide the children with support.

The children generally qualify for AFDC assistance. Prior to promulgation of the community property regulation, the assistance grant was $163.00 per month. The figure was based on lack of any income of Mrs. Nolan and no income actually available from Mr. Nolan. Under the new community property regulation, the grant became $2.00 a month. The regulation counted one-half of Mr. Nolan's income as the income of Mrs. Nolan, which in turn was considered available to meet the needs of the children.

Appellant raises three issues here. He first asserts procedural error in the trial court's denial of the request for oral argument on the motion for summary judgment. He then maintains that summary judgment was improper because the trial court misconstrued a stipulation of fact, and lastly, that the substantive analysis is incorrect. We find no procedural error and conclude that the community property regulation does conflict with federal law. We, therefore, affirm the judgment below.

Local Rule 9(i) of the United States District Court for New Mexico permits the trial judge to dispense with a hearing at his discretion. There is no requirement for a hearing in Fed.R. Civ. P. 56(c), although it does refer for notice purposes to the "time fixed for hearing."

There was no time set for hearing and no hearing, but there was more than adequate opportunity provided. We have previously held that failure to abide by the time requirement of Rule 56(c) denies a trial court authority to enter summary

judgment. Dolese v. United States, 541 F.2d 853 (10th Cir.); Mustang Fuel Corp. v. Youngstown Sheet and Tube Co., 480 F.2d 607 (10th Cir.). However, we specifically noted in *Mustang* that "[u]nder proper circumstances these requirements of the Rule may be waived." This case rather obviously presents the proper circumstances. Summary judgment was granted approximately six months after the motion was filed. Almost thirteen months transpired between the filing of the complaint and the rendering of judgment. The parties briefed the issues extensively, filed affidavits, and stipulated the facts. We cannot say denial of oral argument was improper under these circumstances, and a setting for a day certainly was not required. Although Dredge Corporation v. Penny, 338 F.2d 456 (9th Cir.), is to the contrary, we think the sounder rule is that followed here and in Benson v. Matthews, 554 F.2d 860 (8th Cir.); Kibort v. Hampton, 538 F.2d 90 (5th Cir.); Spark v. Catholic University of America, 510 F.2d 1277 (D.C. Cir.); and similar cases in the Third, Sixth and Seventh Circuits. *See* 6 Moore's Federal Practice Par. 56.14[1], at 56-360. *See also* the holding on the *sua sponte* judgment in United States v. Fisher-Otis Company, Inc., 496 F.2d 1146 (10th Cir.); the combination of factors in Dolese v. United States, 541 F.2d 853 (10th Cir.); and our opinion in Hazen v. Southern Hills National Bank of Tulsa, 414 F.2d 778 (10th Cir.), on a motion to dismiss.

The basic issue here is, of course, whether the regulations conflict. There are no material issues of fact remaining which would preclude summary judgment. Fitzgerald v. General Dairies, Inc., 590 F.2d 874 (10th Cir.); Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir.). Appellant disagrees apparently because of a sentence contained in the memorandum opinion which reads, "It is agreed in the present action that the income in question is that of plaintiff's husband . . . ." He argues that the essence of his position is that Mrs. Nolan has an income by

law since under community property concepts a wife has a half-interest in the husband's income. He thus believes the quoted sentence reveals the trial court's misconception of the case. This is obviously not so. We are of the opinion that the sentence merely reiterates the fact that only Mr. Nolan *received* an income. There was no material issue of fact remaining. The trial court's analysis is correct. As a starting point, it has long been recognized that the state implementing regulations for the AFDC program may not contravene Social Security Act provisions or valid HEW regulations. King v. Smith, 392 U.S. 309. There is no question that the pertinent HEW regulation, 45 C.F.R. § 233.90(a), is valid. *See* Lewis v. Martin, 397 U.S. 552. *See also* the consideration of the California community property law in the Railroad Retirement Act case of Hisquierdo v. Hisquierdo, ____U.S.____, 47 U.S.L.W. 4141.

The New Mexico regulation, HSSD Manual § 221.832 B.1, provides in part:

> "1. **Availability of Income** – In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. . . .
>
> . . .
>
> "a. **Division of Income between Spouses** – In keeping with the State's community property law, one half (1/2) the community property income of spouses is considered available to each spouse when they live together. . . ."

The pertinent HEW regulation, 45 C.F.R. § 233.90(a), sets forth what a state may consider in computing the AFDC assistance. Establishing these requirements is within the province of the federal government. The regulation clearly limits a state to considering only actual contributions to the budget

group, the income of the natural or adoptive parent, and the income of a stepparent legally obligated by state law to provide support.

Operation of appellant's community property regulation obviously contravenes the federal act and HEW's regulation. The income of Mr. Nolan, a non-adoptive stepparent who does not voluntarily contribute to the children's needs, is considered in determining the assistance grant. The regulation has no requirement for determining if Mr. Nolan voluntarily and actually contributes to the children's needs. Arguing that Mrs. Nolan has income under community property does not change the impact of the community property regulation. We see little distinction between the community property regulation and California's AFDC regulation which the Supreme Court ruled invalid in Lewis v. Martin, 397 U.S. 552, and *Hisquierdo.* In *Lewis,* the invalid regulation conclusively presumed that the income of a non-adoptive stepparent is available to the children. Here, the regulation conclusively presumes one-half of the non-adoptive stepparent's income is available, albeit through the other spouse's so-called community property income interest. Arguing legal concepts of income does not change what in reality occurs with this regulation. We are of the opinion that Lewis v. Martin, 397 U.S. 552, and King v. Smith, 392 U.S. 309, require the result reached here.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY TERM – August 13, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges

JACQUELINE NOLAN, on behalf of herself and on behalf of her minor children, DANIEL SCHMITZ, DEBORAH SCHMITZ and DWAYNE SCHMITZ, Plaintiff-Appellee, vs. FERNANDO C. de BACA, individually and as Executive Director, New Mexico Department of Health and Social Services, Defendant-Appellant.	)	JUDGMENT No. 78-1061 (D.C. No. 76-612-B)

This cause came on to be heard on the record on appeal from the United States District Court for the _____ District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-364

FERNANDO C. de BACA,
Petitioner,

v.

JACQUELINE NOLAN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner~~(s)~~,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 11, 1979.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 29th
day of October, 19 79.

APPENDIX F

42 U.S.C. §601

42 U.S.C. §601, appearing at p. 635 of U.S.C. 1976 ed., Vol. 10, provides:

§601. Authorization of appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

New Mexico Community Property Act

Pertinent parts of the New Mexico Community Property Act of 1973, being § §40-3-6 to 40-3-17 N.M.S.A. 1978 compilation and appearing at pp. 20-32 of Original Pamphlet 62, provide:

40-3-6. Short title.

This act [40-3-6 to 40-3-17 NMSA 1978] may be cited as the "Community Property Act of 1973."

40-3-7. Purpose of act.

The purpose of the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978] is to comply with the provisions of Section 18 of Article 2 of the constitution of New Mexico, as it was amended in 1972 and became effective on July 1, 1973, by making the provisions of the community property law of New Mexico apply equally to all persons regardless of sex.

40-3-8. Classes of property.

A. "Separate property" means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978 unless the decree provides otherwise;

(3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent;

(5) property designated as separate property by a written agreement between the spouses; and

(6) each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in tenancy in common.

B. "Community property" means property acquired by either or both spouses during marriage which is not separate property.

C. "Property" includes the rents, issues and profits thereof.

D. The right to hold property as joint tenants in common and the legal incidents of so holding, including but not limited to the incident of the right of survivorship of joint tenancy, are not altered by the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978], except as provided in Sections 40-3-10, 40-3-11 and 40-3-13 NMSA 1978.

40-3-9. Definition of separate and community debts.

A. "Separate debt" means:

(1) a debt contracted or incurred by a spouse before marriage or after entry of a decree of dissolution of marriage;

(2) a debt contracted or incurred by a spouse after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978 unless the decree provides otherwise;

(3) a debt designated as a separate debt of a spouse by a judgment or decree of any court having jurisdiction;

(4) a debt contracted by a spouse during marriage which is identified by a spouse to the creditor in writing at the time of its creation as the separate debt of the contracting spouse; or

(5) a debt which arises from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage.

B. "Community debt" means a debt contracted or incurred by either or both spouses during marriage which is not a separate debt.

40-3-10. Priorities for satisfaction of separate debts.

A. The separate debt of a spouse shall be satisfied first from the debtor spouse's separate property, excluding that spouse's interest in property in which each of the spouses owns an undivided equal interest as a joint tenant or tenant in common. Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's one-half interest in the community property or in property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's interest in the residence of the spouses, except as provided in Section 42-10-9 NMSA 1978. Neither spouse's interest in

community property or separate property shall be liable for the separate debt of the other spouse.

B. The priorities or exemptions established in this section for the satisfaction of a separate debt must be claimed by either spouse under the procedure set forth in Section 42-10-13 NMSA 1978, or the right to claim such priorities or exemptions is waived as between a spouse and the creditor.

C. This section shall apply only while both spouses are living, and shall not apply to the satisfaction of debts after the death of one or both spouses.

40-3-11. Priorities for satisfaction of community debts.

A. Community debts shall be satisfied first from all community property and all property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied from the residence of the spouses, except as provided in Section 42-10-9 NMSA 1978. Should such property be insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable for its satisfaction. If both spouses contracted or incurred the debt, the separate property of both spouses is jointly and severally liable for its satisfaction.

B. The priorities or exemptions established in this section for the satisfaction of community debts must be claimed by either spouse under the procedure set forth in Section 42-10-13 NMSA 1978 or the right to claim such priorities or exemptions is waived as between a spouse and the creditor.

C. This section shall apply only while both spouses are living, and shall not apply to the satisfaction of debts after the death of one or both spouses.

40-3-12. Presumption of community property; presumption of separate property where property acquired by married woman prior to July 1, 1973.

A. Property acquired during marriage by either husband or wife, or both, is presumed to be community property.

* * *

40-3-14. Management and control of other community personal property.

A. Except as provided in Subsections B and C of this section, either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property.

B. Where only one spouse is:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in or which is the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; only the spouse so named may manage, control, dispose of or encumber the community personal property described in such a document evidencing ownership or in such a written agreement.

C. Where both spouses are:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement with a third party as having joint authority to dispose of or encumber the community personal property which is described in or the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; both spouses must join to dispose of or encumber such community personal property where the names of the

spouses are joined by the word "and." Where the names of the spouses are joined by the word "or," or by the words "and/or," either spouse alone may dispose of or encumber such community personal property.

New Mexico Declaratory Judgment Act

Pertinent parts of the New Mexico Declaratory Judgment Act, being §§44-6-1 to 44-6-15 N.M.S.A. 1978 compilation and appearing at pp. 41-47 of Original Pamphlet 66, provide:

44-6-1. Short title.

This act [44-6-1 to 44-6-15 NMSA 1978] may be cited as the "Declaratory Judgment Act."

44-6-2. Scope.

In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and shall have the force and effect of a final judgment or decree.

44-6-3. Definition.

As used in the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], "person" means any person, partnership, joint stock company, unincorporated association or society or municipal or other corporation of any character whatsoever.

44-6-4. Power to construe.

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a

statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

44-6-5. Contract construction.

A contract may be construed either before or after there has been a breach thereof.

44-6-6. Enumeration not exclusive.

The enumeration in Section 4 [44-6-4 NMSA 1978] and 5 [44-6-5 NMSA 1978] of the Declaratory Judgment Act does not limit or restrict the exercise of the general powers conferred in Section 2 [44-6-2 NMSA 1978], in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

44-6-7. Discretionary.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

* * *

44-6-9. Supplemental relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

* * *

44-6-12. Parties.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

44-6-13. State or official may be sued; construction of constitution or statute.

For the purpose of the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

44-6-14. Construction.

The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] is declared to be remedial. The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.

44-6-15. Uniformity of interpretation.

The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

FILED
MAR 28 1980
MICHAEL RODAK, JR., CLERK

No. 79–907

IN THE

Supreme Court of the United States

October Term, 1979

LAWRENCE B. INGRAM, Secretary,
Department of Human Services of
New Mexico,

Petitioner,

v.

JACQUELINE NOLAN, *et al,*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S FIRST SUPPLEMENTAL BRIEF

JEFF BINGAMAN
Attorney General of New Mexico

ROBERT N. HILGENDORF
Deputy Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

GORDON L. BERGMAN
Assistant Attorney General
Post Office Box 2348
Santa Fe, New Mexico 87501
(505) 827-2305

Attorneys for Petitioner

March 28, 1980

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

TABLE OF CONTENTS

		Page
TABLE OF CITATIONS		ii
BACKGROUND		1
ARGUMENT		2
CONCLUSION		4
APPENDICES		
Appendix A	Opinion of the Court of Appeals of the State of New Mexico, March 4, 1980, *Isabel Duran v. New Mexico Department of Human Services, Income Support Division,* No. 4350.	1a
Appendix B	Certification to the Supreme Court [of New Mexico], March 5, 1980, *Lisa Harper v. New Mexico Department of Human Services, Income Support Division,* No. 4392	13a

TABLE OF CITATIONS

Cases:

Page

Arizona Department of Public Welfare v. HEW,
449 F.2d 456 (9th Cir. 1971),
cert. denied, 405 U.S. 919 (1972) 4

Barela v. New Mexico Department of Human Services, Income Support Division,
____N.M.____, ____P.2d____ (Ct.App. 1979),
No. 4059, 18 N.M. St. B. Bull. 930 (filed October 30, 1979), *cert. denied* December 14, 1979 . 2

Duran v. New Mexico Department of Human Services,
Court of Appeals for New Mexico, No. 4350,
petition for certiorari filed March 24, 1980,
Supreme Court of New Mexico, No. 13,005. . . . 2, 3

Harper v. New Mexico Department of Human Services, Income Support Division,
Court of Appeals for New Mexico, No. 4392,
certified March 5, 1980 to Supreme Court of New Mexico, No. 12,972. . . . . 2, 3, 4, 5

Nolan v. C. de Baca,
603 F.2d 810 (1979), pet. cert. pending herein *sub nom Ingram v. Nolan,* No. 79-907,
October Term, 1979. . . . . 2, 3

Federal Statutes:

42 U.S.C. § 604, Section 404 of the Social Security Act 3, 4

IN THE

Supreme Court of the United States

October Term, 1979

No. 79–907

LAWRENCE B. INGRAM, Secretary,
Department of Human Services of
New Mexico,
Petitioner,

v.

JACQUELINE NOLAN, *et al,*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S FIRST SUPPLEMENTAL BRIEF

The petitioning department files this supplemental brief to inform the court of a recent New Mexico decision (App. A, pp. 1a-12a) that may well affect this Court's disposition of the pending petition for certiorari.

BACKGROUND

The department seeks review of the opinion and judgment rendered August 13, 1979 by the United States Court of Appeals for the Tenth Circuit (Pet. pp. 1-2). That opinion,

Nolan v. C. de Baca (hereinafter "*Nolan*") is reported at 603 F.2d 810 (1979) (Pet. pp. 7a-11a).

On December 11, 1979, when the Petition for Certiorari in this case was filed, three State cases with essentially the same legal issues as *Nolan* were then pending in the appellate courts of New Mexico (Pet. p. 14, footnote 2). These three State cases will be referred to for convenience in this brief as *Barela, Duran,* and *Harper* respectively.

In the first of the three State cases, *Barela,* the New Mexico Court of Appeals chose to follow the *Nolan* decision and ruled against the department on October 30, 1979. (See Respondent Nolan's Brief in Opposition at 7). On December 14, 1979, the New Mexico Supreme Court denied certiorari in *Barela.*

However, in the second State case, *Duran,* the New Mexico Court of Appeals expressly rejected the rationale of the *Nolan* decision, overruled its earlier decision in *Barela,* and ruled in favor of the department. The *Duran* opinion, issued March 4, 1980 and not yet reported, is set forth in full in this Brief at Appendix A, pp. 1a-12a.

The third State case, *Harper,* was then certified to the New Mexico Supreme Court (App. B, p. 13a) on March 5, 1980 and filed as No. 12,972. Supplemental briefs are to be filed by April 15, 1980, with oral arguments currently anticipated for May, 1980.

ARGUMENT

The New Mexico Court of Appeals concluded in its March 4, 1980 *Duran* opinion that under the facts of the case, "there is no reason for breaching the State's 'complex of family and family-property arrangements' " (App. A, p. 11a). The Court expressed a view matching the department's position in its

petition for certiorari filed herein (See Pet., pp. 8 *et seq.*) that the department's regulation is not in conflict with but is mandated by federal policy. The Court stressed the otherwise "undermining effect . . . on New Mexico's longstanding view of community property rights . . .".

Now, instead of a potential conflict of federal and state decisions, we have a real one. The resultant uncertainty in the law vitally affects the public interest. Even the counsel who opposes the department in this case and in the *Duran* and *Harper* State cases appears to strongly agree with this. For as he states in his "Petition of Isabel Duran for a Writ of Certiorari", filed March 24, 1980 in *Isabel Duran v. New Mexico Department of Human Services, Income Support Division,* No. 13,005, Supreme Court of New Mexico:

> If the decisions of the federal and state courts of appeals in *Nolan* and *Duran* are left standing, the result will be an irreconcilable conflict of opinions over the validity of the community property regulation. The judgment and mandate of the federal court of appeals in *Nolan* would establish the invalidity of the regulation, and the judgment and mandate of the state court of appeals in *Duran* would establish the validity of the regulation. Such a conflict would create great uncertainty in the law and confusion among the courts, DHS [Department of Human Services], and AFDC applicants and recipients. Inevitably, such a conflict would require further litigation and further expenditure of judicial time and resources.

Moreover, such uncertainty in the law could very well provoke administrative and judicial proceedings by the federal government against DHS. Pursuant to section 404 of the Social Security Act, 42 U.S.C. § 604, the United States Department of Health, Education and Welfare (HEW) is empowered to institute conformity

proceedings against state agencies who are administering their AFDC programs in violation of controlling federal statutes and regulations. *See, e.g., Arizona Department of Public Welfare v. HEW*, 449 F.2d 456 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). If DHS adheres to its community property regulation and HEW concludes that the regulation is contrary to the controlling federal statutes and regulations, HEW could institute the conformity proceedings provided for in 42 U.S.C. § 604. Such proceedings not only would require the expenditure of considerable time and resources, but could subject the State of New Mexico to the loss of hundreds of millions of dollars in federal matching grants.

Clearly, the uncertainty in the law created by the decision of the court of appeals below vitally affects the public interest. This Court could resolve the confusion and uncertainty created by the decision below by granting review and reversing the court of appeals' decision.

CONCLUSION

For the foregoing reasons, the department strongly feels that this case is appropriate for review by this Court. We anticipate that whichever side loses in the *Harper* case pending before the New Mexico Supreme Court will petition this Court for certiorari review of the State Court's decision.

However, we acknowledge that because the issues in this case have not yet had the benefit of being addressed by the highest court in our State, it might be appropriate for this

Court to defer consideration of our petition until the New Mexico Supreme Court has taken final action in *Harper*.

Respectfully submitted,

JEFF BINGAMAN
Attorney General of New Mexico

ROBERT N. HILGENDORF
Deputy Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

GORDON L. BERGMAN
Assistant Attorney General
Post Office Box 2348
Santa Fe, New Mexico 87501
(505) 827-2305

Attorneys for Petitioner

March 28, 1980

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

March 4, 1980

ISABEL DURAN,

Appellant,

v.

NEW MEXICO DEPARTMENT OF HUMAN SERVICES, INCOME SUPPORT DIVISION,

Appellee.

No. 4350
ADMINISTRATIVE APPEAL

OPINION

HENDLEY, Judge

Mrs. Duran appeals from an administrative denial of her application, on behalf of her one dependent child, for aid to families with dependent children (AFDC) benefits.

FACTS

Isabel Duran is married to Mr. Duran. Mrs. Duran's daughter, Jessica, a minor child of a former marriage, lives with Mr. and Mrs. Duran. Mr. Duran has employment income. They also have income from rental property. The State used one-half of all income in computing need. On this basis income exceeded the permissible limits. Benefits were denied.

The sole issue presented to this court is the validity of New Mexico's method of calculating income available for the child's

support. In calculating a child's eligibility for AFDC benefits, the New Mexico Department of Human Services Manual, § 221.832, states in part:

> A. *Availability of Income* – In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. . . .
>
> * * *
>
> 1. *Division of Income between Spouses* – In keeping with the State's community property law, one half (1/2) the community property income of spouses is considered available to each spouse when they live together. The separate income of a spouse is considered available only to that spouse. . . .
>
> * * *
>
> All income received by the spouses will be considered community income, unless the client can demonstrate, to the worker's satisfaction, that it is separate income.
>
> * * *
>
> 2. *Income of a Parent* – When children and their parent(s) live together, the income of the parent(s) is considered to be available to the budget group which includes that parents' [sic] dependent children. . . . The amount of income available is that which remains after the deduction of the maintenance allowances described in paragraph 5 below.

BARELA AND NOLAN

Two earlier cases have interpreted this precise issue. *See* Barela v. New Mexico Department of Human Services, Income Support Division, ____N.M.____,____P.2d____ (Ct.App. 1979), No. 4059, 18 N.M. St. B. Bull. 930 (filed October 30, 1979), *cert. denied* December 14, 1979; Nolan v. de Baca, 603 F.2d 810 (10th Cir. 1979). Both of these cases found the New Mexico rule to be in violation of the relevant federal regulation, 45 C.F.R., § 233.90(a), and, therefore, invalid under the supremacy clause. That section states in part:

> (a) *State plan requirements.* A State plan under title IV-A of the Social Security Act shall provide that:
>
> (1) The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents tc support stepchildren to the same extent that natural or adoptive parents are required to support their children. . . .
>
> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions; . . . .

We believe both cases have misinterpreted the focus of New Mexico's regulation. In *Barela* the court viewed the New Mexico regulation as presuming that one-half of the wage earner's income was available to the support of the stepchild, even though no legal duty to support the stepchild exists. The court went on to state that in the absence of actual proof of stepparent's income being made available to the child, the

regulation was impermissible. Relying on Hisquierdo v. Hisquierdo, ____U.S.____, 59 L.Ed.2d 1, 99 S.Ct. 802 (1979), *Barela* said that, since the New Mexico regulation is contrary to and serves to subvert federal regulations, it must fall.

Two basic considerations underlying the *Barela* decision are: (1) that the income being presumed available for the support of the child is the income of the wage-earner's stepfather as opposed to that of the mother; and (2) that reaching income earned by the stepfather is contrary to and subverts important federal policy.

The *Nolan* case is similarly based on the same assumptions. In *Nolan* the court adopted the following finding of the trial court: " 'it is agreed in the present action that the income in question is that of plaintiff's husband . . .' ". The court then continued to develop the policy basis underlying its federal pre-emption argument.

Nolan cited 45 C.F.R., § 233.90(a), and the United States Supreme Court's decision in Lewis v. Martin, 397 U.S. 552, 25 L.Ed.2d 561, 90 S.Ct. 1282 (1970), for the proposition that "parent" within the meaning of the federal regulations is limited to one against whom the child would be able to initiate a legal action to enforce that person's duty to support the child. The court concluded that, since the New Mexico regulation is contrary to an important federal policy, under *Hisquierdo* the regulation must fall. *Nolan* also argued that the State's position on the definition of income was merely a technical argument and as a practical matter failed to distinguish itself from the presumptions struck down in *Lewis,* which held that the income from a "man-in-the-house" could not be presumed available for the child's support.

FEDERAL CONCEPT OF COMMUNITY PROPERTY INCOME

In Poe v. Seaborn, 282 U.S. 101, 75 L.Ed. 234, 51 S.Ct. 11 (1930), the Supreme Court stated:

> Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both. A description of the community system of Washington and of the rights of the spouses, and of the powers of the husband as manager, will be found in Warburton v. White, 176 U.S. 484.
>
> The taxpayer contends that if the test of texability [*sic*] under Sections 210 and 211 is ownership, it is clear that income of community property is owned by the community and that husband and wife have each a present vested one-half interest therein.
>
> * * *
>
> The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers, by no means negatives of the wife's present interest as a co-owner.
>
> We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife.

This same result was reached with regard to other community property states by the United States Supreme Court. *See* Goodell v. Koch, 282 U.S. 118, 75 L.Ed. 247, 51 S.Ct. 62 (1930) [Ariz. law]; Hopkins v. Bacon, 282 U.S. 122, 75 L.Ed.

249, 51 S.Ct. 62 (1930) [Tex. law]; and Bender v. Pfaff, 282 U.S. 127, 75 L.Ed. 252, 51 S.Ct. 64 (1930) [La. law]. In *Hopkins* the Supreme Court explained its holdings in all four cases as resting on whether the wife has "a proprietary vested interest in the community property".

NEW MEXICO'S CONCEPT OF COMMUNITY PROPERTY INCOME

New Mexico has long recognized that its community property system grants the wife a present proprietary interest in the income of the community. In Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919), the Supreme Court stated that New Mexico's community property law "clearly recognizes an existing, present interest [in the income of the community] in the wife during the existence of the matrimonial status". *Beals* went on to state:

> From the foregoing, the following propositions may be accepted as settled:
>
> 1. That under the law in this jurisdiction, the wife's interest in the community property is equal with that of the husband; that while he is by statute made the agent of the community and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property by reason of such fact is not superior to that of his wife.

See also Swihart on New Mexico's long-standing commitment to the proposition of equal ownership by the spouses in "Federal Taxation of New Mexico Community Property", 3 Natural Resources Journal, 104, 113-116 (1963-1964).

In Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978), our Supreme Court stated:

> The reasonableness of community ownership of marital property has been recognized by courts in non-community property states. It has been rightfully held

> that, viewed solely as a matter of economy, the labor, pain, and drudgery required of the mother in sustaining the home, giving birth to and rearing the children will often more than offset the contribution of the father to the family budget. In *Strauss v. Strauss,* 148 Fla. 23, 3 So.2d 727, 728 (1941) the court wistfully pointed out:
>
> > In the southwest, where community property is recognized, the husband and wife share equally in all property accumulated during coverture. There is a perfectly sound basis for this rule and it will be applied in this State when the circumstances warrant.
> >
> > * * *
>
> Under community property law no distinction is made between husband and wife in respect to the right each has in the community property. The husband receives no higher or better title than does the wife. The plain public policy that this law expresses is that the wife shall have equal rights and equal dignity and shall be an equal benefactor in the matrimonial gain. "It is altogether fitting and proper that woman should be thus esteemed by the law in fixing her status if she is to be considered in fact as well as in theory an essential factor in the economy of the marital community." *La Tourette v. La Tourette,* 15 Ariz. 200, 137 P. 426, 428 (1914).

Further, New Mexico's commitment to equal ownership of community assets is based upon a constitutional mandate. This is expressly recognized in § 40-3-7, N.M.S.A. 1978, which states:

> 40-3-7. **Purpose of act.**
>
> The purpose of the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978] is to comply with the provisions of Section 18 of Article 2 of the constitution of New Mexico, as it was amended in 1972 and became effective on July 1, 1973, by making the

provisions of the community property law of New Mexico apply equally to all persons regardless of sex.

Therefore, under the standards announced by the United States Supreme Court in *Poe* and *Hopkins,* the wife has income equal to one-half the total community income regardless of what proportion of that income is actually paid to that spouse in the form of wages or rents. Under this standard Mrs. Duran clearly has income equal to one-half the community income.

CHILD'S LEGAL RIGHT TO REACH INCOME

As the court stated in *Nolan,* the crux of the matter is not whether under some legal technicality you can describe the wife as having an income equal to one-half the community income. The issue is whether the child has a means of enforcing the obligation of support to the extent of the value presumed to be available. In short, 45 C.F.R., § 233.90(a), and *Lewis* hold that a state may not presume money to be available for a child's support if the child cannot legally force that money to be applied to his or her support. The heart of the *Barela* decision and that in *Nolan* is that the child in New Mexico has no legal right to enforce the presumed support against the income earned by the stepfather. Therefore, the sole question is whether Jessica Chavira can force the income being credited to her mother for her support to be used for that support.

It is undisputed that the natural parent, Mrs. Duran, has an obligation to support her daughter, Jessica. Adoption of Doe, 89 N.M. 606, 555 P.2d 906 (Ct.App. 1976). It appears equally clear that Jessica could obtain a judgment forcing Mrs. Duran to adequately support her. Section 40-3-10A, N.M.S.A. 1978, sets the priorities for satisfaction of separate debts:

> A. The separate debt of a spouse shall be satisfied first from the debtor spouse's separate property, excluding that spouse's interest in property in which each of

> the spouses owns an undivided equal interest as a joint tenant or tenant in common. *Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's one-half interest in the community property* or in property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's interest in the residence of the spouses, except as provided in Section 42-10-9 NMSA 1978. Neither spouse's interest in community property or separate property shall be liable for the separate debt of the other spouse. (Emphasis added.)

Therefore, Mrs. Duran does not only have a technical income resulting from her one-half share in the community income, but that one-half share in the community income provides the legal basis for her daughter's legitimate claim on that one-half interest in the community income.

In *Barela* the court cites Kelley v. Iowa Department of Social Services, 197 N.W.2d 192 (1972). In *Kelley* the court allowed the Iowa Department of Social Services to presume money earned by that stepfather to be available for the support of the stepdaughter because the stepdaughter could make a legal claim on those funds. Similarly, in the instant case the State should be permitted to presume that one-half of Mr. Duran's income, Mrs. Duran's interest in the community income, is available for the support of Jessica because Jessica can also make a legal demand on that sum of money because of a duty to support. *See* Adoption of Doe, *supra.*

Appellant's reliance on *Hisquierdo* is misplaced. In *Hisquierdo* the community property rules of the State of California served to provide the wife with an interest that was expressly forbidden by statute. In the instant case there is no such conflict

with federal regulations or statutes. The New Mexico rule serves to fulfill the policy considerations expressed within 42 U.S.C., § 602(a) (7), which provides in part:

> (a) A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, ...

Where a parent has income that is available for the support of the child it is inappropriate for the State not to count that income for the child's support. To say that one-half of the community income is not available to the wife to support the wife's child is to similarly deny the wife's right to one-half the community interest for any reason. *Barela* is contrary to long-established New Mexico law which grants the wife a present one-half interest in the income earned by the community. *Beals, supra; Hughes, supra;* and Swihart, "Federal Taxation of New Mexico Community Property," *supra.*

A final important policy consideration was explained in United States v. Yazell, 382 U.S. 341, 15 L.Ed.2d 404, 86 S.Ct. 500 (1966) when the court stated:

> We decide only that this Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here. Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

> Each State has its complex of family and family-property arrangements. There is presented in this case no reason for breaching them. . . .

Under the facts of this case there is no reason for breaching the State's "complex of family and family-property arrangements".

The two basic assumptions upon which *Nolan* and *Barela* were based are incorrect. New Mexico's regulation § 221.832 is not in conflict with federal policy. That policy mandates that this rule be upheld. Equally, if not more important, is the undermining effect the *Barela* decision has on New Mexico's long-standing view of community property rights, which has been recently reaffirmed in *Hughes. Barela* mistakenly interpreted the law and is accordingly overruled. *See* State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct.App. 1974).

The decision of the New Mexico Department of Human Services, Income Support Division, is affirmed.

IT IS SO ORDERED.

/s/ William R. Hendley
Judge

I CONCUR:

B. C. Hernandez J. (Dissenting)

/s/ Leila Andrews J.

HERNANDEZ, Judge (Dissenting)

I respectfully dissent.

The decision of the Department should be reversed on the basis of Barela v. New Mexico Department of Human Services, ____N.M.____, ____P.2d____ (Ct. App. 1979), No. 4059, 18 N.M. St. B. Bull. 930 (filed October 30, 1979), *cert. denied* December 14, 1979, and Nolan v. de Baca, 603 F.2d 810 (10th Cir. 1979).

The relevant HEW regulation, 45 C.F.R., §233.90 (a) (1), provides in part:

. . . .

> In establishing financial eligibility and the amount of the assistance payment, only such net income as is *actually* available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions; . . . . [Emphasis added.]

While the regualtion [*sic*] clearly permits a state to consider the income of the natural or adoptive parent in computing AFDC assistance, it is my opinion, based on the above cited provision, that it is the intent of the federal regulation that only *actual* income be computed. While a spouse has a present proprietary interest in one-half of the community income under New Mexico community property law, this legal concept of income does not necessarily mean that the spouse has *actual* income. The New Mexico regulation makes an impermissable [*sic*] assumption of actual income.

/s/ B. C. Hernandez
JUDGE

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO
Wednesday, March 5, 1980

LISA HARPER,
Appellant,
v.
No. 4392

NEW MEXICO DEPARTMENT
OF HUMAN SERVICES,
INCOME SUPPORT DIVISION,
Appellee.

CERTIFICATION TO THE SUPREME COURT

Pursuant to § 34-5-14(C) (2), N.M.S.A. 1978, the Court of Appeals is authorized to certify to the Supreme Court issues of substantial public interest that should be determined by the Supreme Court.

Attached hereto are copies of the Court of Appeals opinions in Duran v. New Mexico Department of Human Services, Income Support Division, Ct.App. No. 4350, filed March 4, 1980, and Barela v. New Mexico Department of Human Services, Income Support Division, Ct.App. No. 4059, filed October 30, 1979.

The two opinions involve the same basic factual pattern but the decisions, which are by different panels, are in conflict. The two conflicting opinions create an uncertainty in the law in that there is no guidance for the litigant.

An uncertain state of the law should not exist and because of this, an issue of substantial public interest is created and should be determined by the Supreme Court.

NOW, THEREFORE, pursuant to § 34-5-14(C) (2), *supra*, the above captioned cause is hereby certified to the New Mexico Supreme Court.

/s/ Joe W. Wood
Chief Judge

/s/ William R. Hendley
Judge

/s/ B. C. Hernandez
Judge

Cm

RECEIVED
JAN 10 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-907

LAWRENCE INGRAM, Secretary,
Department of Human Services
of New Mexico,

Petitioner,

vs.

JACQUELINE NOLAN, on Behalf of
Herself and on Behalf of Her
Minor Children, Daniel Schmitz,
Deborah Schmitz and Dwayne
Schmitz,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RESPONDENT JACQUELINE NOLAN'S BRIEF IN OPPOSITION

Joseph Goldberg
Helene Simson

University of New Mexico
School of Law
Clinical Law Program
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2838

Counsel for Respondent

10/

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons for Denying the Writ	4
Conclusion	11

TABLE OF CITATIONS

CASES:

Barela v. New Mexico Department of Human Services, 18 N.M. Adv. Sh. 51 (Ct. App. Oct. 30, 1979) (No. 4059)	7
Bender v. Pfaff, 282 U.S. 127 (1930)	8
Camp v. Swoap, 94 Cal. App. 3d 733, 156 Cal. Rptr. 600 (1979)	8
Duingan v. United States, 274 U.S. 196 (1927)	7
Fry v. United States, 421 U.S. 542 (1975)	11
Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979)	11
Hopkins v. Bacon, 282 U.S. 122 (1930)	8
King v. Smith, 392 U.S. 309 (1968)	10
Lewis v. Martin, 397 U.S. 552 (1970)	9, 10
Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946)	6
Poe v. Seaborn, 282 U.S. 101 (1930)	8
Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), aff'd, 391 U.S. 5 (1969)	10
Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974), *rev'd sub nom. Van Lare v. Hurley*, 421 U.S. 338 (1975)	10
United States v. Yazell, 382 U.S. 341 (1966)	9

	Page
Van Lare v. Hurley, 421 U.S. 338 (1975)	9, 10
Zellenbach v. Helvering, 293 U.S. 172 (1934)	6
STATUTES AND REGULATIONS:	
28 U.S.C. § 1254(1)	2
42 U.S.C. § 602(a)	4
45 C.F.R. § 233.90(a)	4, 9, 10
45 C.F.R. § 233.20(a)(3)(ii)	4, 9
42 Fed. Reg. 6583 (Feb. 3, 1977)	10
HSSD Man. § 221.832	2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-907

LAWRENCE INGRAM, Secretary,
Department of Human Services
of New Mexico,

Petitioner,

vs.

JACQUELINE NOLAN, on Behalf of
Herself and on Behalf of Her
Minor Children, Daniel Schmitz,
Deborah Schmitz and Dwayne
Schmitz,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT JACQUELINE NOLAN'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion and Judgment of the United States District Court for the District of New Mexico are unreported but may be found at pages 1a-6a of the Appendix to the Petition for a Writ of Certiorari.[1] The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 603 F.2d 810 (1979) and is found at pages 7a-11a of the Appendix to the Petition for a Writ of Certiorari.

[1]The Petition for Writ of Certiorari is cited as "Pet." The Appendix to the Petition is cited as "Pet. App."

JURISDICTION

The Judgment, Pet. App. D at 12a, of the United States Court of Appeals for the Tenth Circuit was filed on August 13, 1979. By order of Mr. Justice White, the time for filing the Petition for a Writ of Certiorari was extended to December 11, 1979. Pet. App. E at 13a. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed in this Court on December 11, 1979. The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the district court and court of appeals below correctly decided that New Mexico Department of Human Services' regulation, HSSD Man. § 221.832, by conclusively assuming that approximately one-half of a nonadoptive stepfather's income is available to meet the needs of his stepchildren receiving Aid to Families with Dependent Children (AFDC) assistance, is invalid as contrary to controlling federal regulations.

STATEMENT

The Petitioner seeks review of a unanimous opinion of the United States Court of Appeals for the Tenth Circuit holding per curiam that certain practices of the New Mexico Department of Human Services ("Department")[2] in administering the AFDC program were contrary to the controlling federal statute and

[2]Due to the State reorganization referred to by Petitioner, Pet. at 1 n. 1, the name of the State agency administering the AFDC program was changed from Health and Social Services Department (HSSD) to Department of Human Services. For convenience, the agency will be referred to by its current name, and reference to the State regulation will be to the HSSD Manual in force at the time the case was decided in the courts below.

regulations and hence were invalid. Specifically, the court of appeals below ruled invalid the practice of the Department in conclusively assuming that approximately one-half of the income of a nonadoptive stepfather is available to meet the needs of his stepchildren receiving AFDC assistance. This income presumption is embodied in the Department's AFDC regulation found in HSSD Man. § 221.832, commonly referred to as the "community property" regulation.

This lawsuit was instituted by Jacqueline Nolan, on behalf of herself and her three minor children, Deborah, Daniel, and Dwayne Schmitz. The three Schmitz children are the natural children of Mrs. Nolan by her first marriage (R. 103). The Schmitz children reside with Mrs. Nolan and her present husband, Michael Nolan, in Belen, New Mexico (R. 103, 159). Mr. Nolan is neither the natural nor the adoptive father of the Schmitz children; as such, under New Mexico law, Mr. Nolan is not obligated to support the children (R. 103, 107, 159). In fact, Mr. Nolan cannot and does not voluntarily or regularly make his income available to meet the financial needs of the Schmitz children (R. 79-80, 107).

Since 1971, the Schmitz children have been receiving assistance pursuant to the AFDC program administered by the Department (R. 103-04, 160). Neither Michael Nolan nor Jacqueline Nolan are applicants for or recipients of AFDC, and the AFDC grant to the Schmitz children is computed to meet the needs only of the three children (R. 104). In October 1976, Mrs. Nolan was notified by the Department that the AFDC assistance to her three children would be reduced from One Hundred Sixty-three Dollars ($163) a month to Two Dollars ($2) a month (R. 105, 160). The sole basis for this proposed reduction in AFDC assistance was the operation of the Department's community property regulation (R. 105, 160). There was no change

in the financial circumstances of the Nolan-Schmitz household during this period which invoked the proposed reduction in AFDC assistance. Rather, pursuant to the Department's regulation, one hundred eighty-six dollars of Mr. Nolan's income was considered available to meet the needs of the Schmitz children (R. 105-06, 160-61). This conclusive attribution of income was made solely by legal operation of the community property regulation; no inquiry was made by the Department into whether Mr. Nolan in fact made any of his income available to meet the needs of the Schmitz children (R. 106, 161).

It was this proposed reduction in AFDC assistance to her three children of which Mrs. Nolan complained in this suit. In a three-count complaint, Mrs. Nolan challenged the Department's community property regulation as contrary to the due process and equal protection clauses of the fourteenth amendment; section 402(a) of the Social Security Act, 42 U.S.C. § 602(a); and implementing regulations of the United States Department of Health, Education and Welfare (HEW), 45 C.F.R. §§ 233.90(a), 233.20(a)(3)(ii)(D). On November 28, 1977, the district court entered summary judgment on count one of Mrs. Nolan's complaint, holding that "the State's regulation contravenes its [45 C.F.R. § 233.90(a)] provisions and those of the Social Security Act." Pet. App. at 5a. On appeal to the United States Court of Appeals for the Tenth Circuit, the judgment of the district court was affirmed, the court of appeals holding that the "operation of appellant's community property regulation obviously contravenes the federal [Social Security] act and HEW's regulation." Pet. App. at 11a.

REASONS FOR DENYING THE WRIT

In his Petition for a Writ of Certiorari, Secretary Ingram raises three questions for review. The first question Petitioner seeks to present is whether certain income of Mr.

Nolan, "as a matter of New Mexico community property law, is community income." Pet. at 2. The second question asks whether the Department's community property regulation "conform[s] to the principles of the State's community property law." Pet. at 2. The third question poses the issue of whether the assumption of income embodied in the Department's community property regulation conflicts with applicable federal statutes or regulations. The first two questions presented by Petitioner are inappropriate for review as they raise narrow and local questions of New Mexico state law and were not decided by either of the courts below. Moreover, Petitioner fails to establish that the decision by the court of appeals below is in conflict with any decisions of this Court, any other circuit court of appeals, or any appellate court of any state.

I.

By his first question presented, Petitioner seeks review of an issue which was not decided by either of the courts below and for which the record provides no factual predicate for resolution. In her complaint, Mrs. Nolan never raised any factual or legal issue over whether any or all of Michael Nolan's income was community property under New Mexico law. The case was submitted to the district court on an extensive stipulation of facts, not one of which addresses the circumstances of Mr. Nolan's earned income or "G.I. Bill" educational benefits. The record in this case is wholly silent on any of the facts which may be determinative[3] of whether the

[3]Exemplary of the kind of factual information which might inform the decision but which is not reflected in the record are such matters as (1) whether Mr. Nolan's service in the armed forces, from which his G.I. Bill benefits derive, was performed prior to his marriage to Mrs. Nolan or during his marriage to Mrs. Nolan; (2) how much Mr. Nolan's G.I. Bill benefits are and how they were calculated; (3) whether the amount of Mr. Nolan's G.I. Bill benefits were based, in part, on the presence in the home of Mrs. Nolan's children.

income should be considered community property under New Mexico law. It is clear that the record established in the courts below will not support a resolution of the question whether Mr. Nolan's earned income and G.I. Bill benefits are community property under New Mexico law. As such the first question presented in the Petition for a Writ of Certiorari takes on a hypothetical cast and is inappropriate for review by this Court.

The second question raised in the Petition for a Writ of Certiorari asks whether the challenged AFDC regulation conforms to New Mexico's community property law. This issue was never squarely presented to or decided by either the district court or the court of appeals. In both courts below, the Department sought to justify its regulation on the basis of New Mexico's community property law. Both courts rejected the proffered justification. The district court stated: "The assumption that New Mexico's community property laws may give plaintiff an interest of some kind in his [Mr. Nolan's] income is not sufficient to bring the regulation into compliance with federal requirements." Pet. App. at 6a. Similarly, the court of appeals stated: "Arguing that Mrs. Nolan has income under community property does not change the impact of the community property regulation." Pet. App. at 11a. In characterizing the rejected justification as an "assertion" or an "argument," both courts carefully avoided deciding whether the regulation was consonant with New Mexico's community property law.

This Court has declined repeatedly to consider questions not clearly decided by the courts below. *See, e.g., Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184-85 (1946); *Zellenbach Paper Co. v. Helvering*, 293 U.S. 172, 182 (1934);

Duingan v. United States, 274 U.S. 196, 200 (1927). Petitioner offers no exceptional circumstances warranting departure from this general rule, as indeed he could not. On this basis alone, review is inappropriate.

Finally, as Petitioner has couched his first two questions presented, they raise only state law issues. Certainly, the question of the characterization of Michael Nolan's income as community property or the question whether the New Mexico AFDC regulation is consistent with New Mexico state law are hardly of such national importance as to warrant this Court's review. Resolution of the first question presented will have impact only in this one case. Resolution of the second issue presented by Petitioner will have impact only in New Mexico. By his first two questions presented, therefore, Petitioner would have this Court reach out to decide issues wholly parochial to New Mexico, not decided by the courts below, and upon a record which will not form a factual predicate for the resolution of at least one of the issues. Under the well-established policies of this Court, review of these issues is inappropriate.

II.

Petitioner points to no decision of other federal circuit courts which conflict with the decision below. Nor does Petitioner appear to argue that the decision below conflicts with decisions of appellate courts of any state. Indeed, in *Barela v. New Mexico Department of Human Services*, 18 N.M. Adv. Sh. 51 (Ct. App. Oct. 30, 1979) (No. 4059), the New Mexico intermediate appellate court clearly held invalid the community property regulation, as inconsistent with the controlling federal statute and regulations. In reaching this result, the New Mexico Court of Appeals expressly relied on the Tenth Circuit's decision in the instant case. Since the

filing of the Petition for a Writ of Certiorari in this case, the New Mexico Supreme Court has declined to review the *Barela* decision.

The only other state court decision which addresses a regulation similar to the one struck down in this case also is consistent with the opinion of the court of appeals below. In *Camp v. Swoap*, 94 Cal. App. 3d 733, 156 Cal. Rptr. 600 (1979), the California intermediate appellate court held invalid a California AFDC regulation which sought to presume one-half the income of a nonadoptive stepfather as available to meet the needs of the stepchildren. Like New Mexico in the instant case, the California welfare agency sought to justify its regulation on the basis of California's community property law. The court, in reasoning substantially identical to that of the courts below, held that the "challenged regulations are incompatible with this federal provision [45 C.F.R. § 233.90(a)] barring states from assuming that nonlegally responsible persons will apply their resources to aid dependent children." 94 Cal. App. 3d at ___, 156 Cal. Rptr. at 607. Clearly, the decision of the court of appeals below is consistent with the holdings and reasonings of the only state court cases confronting this issue.

Finally, Petitioner appears to argue that the decision of the court of appeals below conflicts with applicable decisions of this Court. Such a contention, however, is without merit. Petitioner points to no conflict between the decision below and any holding of this Court. Rather, he seeks to create a conflict between the decision below and language in several decisions of this Court.

Petitioner has cited *Poe v. Seaborn*, 282 U.S. 101 (1930), and its companion cases, *Bender v. Pfaff*, 282 U.S. 127 (1930), and *Hopkins v. Bacon*, 282 U.S. 122 (1930), for the principle

that this Court has recognized that community property states have a concept of marital property different from that of other states. Pet. at 10. Respondent does not quarrel with this. Any claimed conflict between these cases and the decision below, however, is mistaken. These cases stand only for the narrow proposition that the definition of "income" for the limited purposes of the Internal Revenue Code may be governed by state law. It is clear that in the administration of the AFDC program under the Social Security Act, the definition of "income" is governed by federal law. 45 C.F.R. §§ 233.20(a)(3)(ii), 233.90(a); *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Lewis v. Martin*, 397 U.S. 552 (1970).

Petitioner's reliance on *United States v. Yazell*, 382 U.S. 341 (1966), as being in conflict with the decision below, is equally misplaced. *Yazell* involved the enforcement of a contract, an area of law commonly reserved to the states. The Court framed the issue in *Yazell* as follows:

> [W]hether in connection with an individualized, negotiated contract, the Federal Government may obtain a preferred right which is not provided by statute or specific agency regulation, which was not a part of its bargain, and which requires overriding a state law dealing with the intensely local interests of family property and the protection ... of married women.

382 U.S. at 349. In contrast to *Yazell*, this case involves the administration of a federal-state program, in which there are federal statutes and specific agency regulations which would be contravened if Petitioner is permitted to misuse New Mexico's community property law. *See* 45 C.F.R. § 233.90(a).

Contrary to Petitioner's claim, the decision of the court of appeals is in harmony with a well-established line of decisions of this Court, prohibiting states, in the administration of the AFDC program, from presuming that income of nonlegally responsible relatives is available to meet the needs of needy

dependent children receiving AFDC assistance. *See Van Lare v. Hurley*, 421 U.S. 338 (1975); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). Petitioner's narrow reading of *King v. Smith* and *Lewis v. Martin* as "man-in-the-home" and "stepparent" cases, Pet. at 11, is similar to arguments clearly rejected by this Court in *Van Lare*[4] and by HEW in its revision of 45 C.F.R. § 233.90(a) to conform to the *Van Lare* decision. *See* 42 Fed. Reg. 6583 (Feb. 3, 1977). As this Court made abundantly clear in *Van Lare*, the definition of income for purposes of administration of the AFDC program is a matter of federal law, and variant state definitions which seek to assume the availability of income from non-legally responsible relatives are invalid. After this Court's decision in *Van Lare*, there can be no doubt that the provisions of 45 C.F.R. § 233.90(a) control the definition of "income" for AFDC purposes. Petitioner's argument that "*King* and *Lewis* should not be extended to this case," Pet. at 11, comes five years too late. If there were any doubt[5] of the application of *King* and *Lewis* to "income" cases, as Petitioner so labels this case, Pet. at 11, that doubt was resolved explicitly in *Van Lare*.

III.

Finally, Petitioner argues that the decision of the court of appeals below constitutes "a serious breach of State

---

[4]The decision of the United States Court of Appeals for the Second Circuit, reversed in *Van Lare*, read *King v. Smith* narrowly as only defining the term "parent." *See Taylor v. Lavine*, 497 F.2d 1208, 1214-15 (2d Cir. 1974).

[5]There really was little or no doubt over the reach of this Court's decisions in *King* and *Lewis* and their application to state presumptions of income in the AFDC program. Even prior to the *Lewis* decision, this Court's summary affirmance of a three-judge district court decision applying *King* to invalidate a Connecticut income-presumption regulation clearly indicated the reach of the *King* decision. *Solman v. Shapiro*, 300 F. Supp. 409 (D. Conn.), *aff'd*, 391 U.S. 5 (1969).

vereignty." Pet. at 13. Apparently, Petitioner sees the decision of the court of appeals as a threat to the New Mexico community property regime. Pet. at 14-15. The perceived threat is far-fetched. The decision of the court below did not override nor invalidate nor preempt any portion of New Mexico's community property laws. Each sentence of those laws remains in full force and effect just as California's community property laws were not disturbed by the decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

Petitioner misapprehends the nature of the court of appeals' decision in this case. The decision below leaves New Mexico free "to govern its marital and property relationships." Pet. at 14-15. The only impact of the decision of the court of appeals is on New Mexico's administration of the AFDC program, in an area where this Court has repeatedly held that state administration must conform to federal requirements. Viewed in this light, Respondent submits that "[d]espite the extravagent claims made on this score by [Petitioner] ... [the decision below] constituted no such drastic invasion of state sovereignty." *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975).

CONCLUSION

For the reasons stated above, the Writ of Certiorari sought by Petitioner should be denied.

Respectfully submitted,

Joseph Goldberg
Helene Simson

University of New Mexico
School of Law
Clinical Law Program
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-2838

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-907

LAWRENCE INGRAM, Secretary,
Department of Human Services
of New Mexico,

Petitioner,

vs.

JACQUELINE NOLAN, on Behalf of
Herself and on Behalf of Her
Minor Children, Daniel Schmitz,
Deborah Schmitz and Dwayne
Schmitz,

Respondent.

RECEIVED
JAN 10 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATION

I hereby certify that on this ninth day of January, 1980, three copies of a Motion to Proceed in Forma Pauperis, Affidavit in support of such motion, and Respondent's Brief in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to counsel for Petitioner:

Gordon L. Bergman
Assistant Attorney General
P.O. Box 2348
Santa Fe, New Mexico 87501

Joseph Goldberg
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-2838

Counsel for Respondent

No. 79-907

Supreme Court, U.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

LAWRENCE B. INGRAM, SECRETARY, DEPARTMENT OF HUMAN SERVICES OF NEW MEXICO, PETITIONER

v.

JACQUELINE NOLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys
Department of Justice
Washington, D.C. 20530

JOAN Z. BERNSTEIN
General Counsel

DONALD A. GONYA
Assistant General Counsel

RANDOLPH W. GAINES
JOHN B. WATSON
Attorneys
Department of Health, Education, and Welfare
Washington, D.C. 20201

INDEX

Page

Question presented 1

Statement 2

Discussion 5

Conclusion 12

CITATIONS

Cases:

Barela v. *New Mexico Department of Human Services*, No. 4059 (N.M. Ct. App. Oct. 30, 1979) 11

Camp v. *Swoap*, 94 Cal. App. 3d 733, 156 Cal. Rptr. 600 10

Duran v. *New Mexico Department of Human Services*, No. 4350 (N.M. Ct. App. Mar. 4, 1980) 11

Harper v. *New Mexico Department of Human Services*, No. 4392 (N.M. Ct. App.), certification to N.M.S. Ct. (Mar. 5, 1980) 6, 11

Hisquierdo v. *Hisquierdo*, 439 U.S. 572 10

King v. *Smith*, 392 U.S. 309 ..... 2, 7

Lewis v. *Martin*, 397 U.S. 552 7

Reyna v. *Vowell*, 470 F. 2d 494 10

Rosado v. *Wyman*, 397 U.S. 397 2

Van Lare v. *Hurley*, 421 U.S. 338 7

Page

Constitution and statute:

United States Constitution, Fourteenth Amendment 5

Social Security Act, Title IV-A, 42 U.S.C. 601 *et seq.* 2

42 U.S.C. 601 2

42 U.S.C. 602(a) 2, 5

42 U.S.C. 602(a)(7) 6

42 U.S.C. 602(b) 2

Miscellaneous:

45 C.F.R. 233.20(a)(3)(ii)(*c*) (1973) 8

45 C.F.R. 233.20(a)(3)(ii)(D) 5, 7, 8, 9

45 C.F.R. 233.20(a)(3)(vi) 7

45 C.F.R. 233.90(a) 5, 6, 7

38 Fed. Reg. 18254 (1973) 8

40 Fed. Reg. 30963, 30964 (1975) 9

New Mexico Health and Social Services Department Manual, Section 221.832 ..... 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-907

LAWRENCE B. INGRAM, SECRETARY, DEPARTMENT OF HUMAN SERVICES OF NEW MEXICO, PETITIONER

v.

JACQUELINE NOLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether, consistent with the federal Aid to Families with Dependent Children (AFDC) program, a state may consider a natural parent's community-property interest in the income of his or her spouse in determining the amount of the AFDC grant to the natural parent's children, where the spouse is the children's stepparent and is neither legally obligated to support the children nor actually supporting them.

STATEMENT

1. The Aid to Families with Dependent Children (AFDC) program (Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.*) was enacted by Congress in 1935. The purpose of the AFDC program is to encourage the care of needy dependent children in their own homes or those of relatives in order to help maintain and strengthen family life and to assist such parents or relatives to attain self-sufficiency. 42 U.S.C. 601. The AFDC program is "based on a scheme of cooperative federalism." *King* v. *Smith*, 392 U.S. 309, 316 (1968). Participation in the program is optional with the states, but states that elect to provide AFDC benefits to their residents receive substantial reimbursement from the federal government on a matching-fund basis. 42 U.S.C. 603(a). States participating in the AFDC program must submit for federal approval a State Plan that meets all requirements of Title IV-A and its implementing regulations. 42 U.S.C. 601, 602(a) and (b).

New Mexico participates in the AFDC program and has an approved State Plan.[1] Under this Plan, New Mexico employs a three-step process in computing

[1]On June 4, 1976, the regional office of HEW approved an AFDC State Plan amendment containing the New Mexico regulations challenged herein. This approval apparently did not contemplate a situation, such as presented here, involving the attribution of community property in a case in which a stepparent is not legally obligated to support his stepchildren. In any event, such State Plan approval by the regional office does not conclusively determine the validity of a State Plan under the AFDC program. See *King* v. *Smith*, *supra*, 392 U.S. at 333 n.34. The Department of Health, Education, and Welfare is in the process of considering possible measures, depending on the outcome of this action and similar litigation in state court (see note 3 and page 11, *infra*), to bring the New Mexico State Plan into line with federal requirements. See *Rosado* v. *Wyman*, 397 U.S. 397, 406 & n.8 (1970).

eligibility for and the amount of an AFDC grant. First, the State determines the needs of the AFDC "budget group," which by state regulation includes all individuals in a household applying for or receiving AFDC benefits. Once the need standard for the "budget group" is determined, the State subtracts therefrom all income that it considers to be available to the "budget group." The AFDC grant for the "budget group" is then computed as a percentage of the remaining unmet need, if any, and the State pays that amount to the recipients.

Section 221.832 of the New Mexico Health and Social Services Department (H.S.S.D.) Manual (Pet. 3-4) sets forth the State's rules for determining the income available to a "budget group" in a household where the children receive AFDC payments but their natural parent does not. Those rules provide that all of the income of the natural parent is considered to be available to the "budget group," except for certain exclusions and allowances including $49 per month that the State allows for the parent's own maintenance and support. The rules further provide that one-half the community-property income of spouses is considered available to each spouse when they live together. In this way, a portion of the income earned by the natural parent's spouse is automatically considered to be available for the support of the "budget group" even though the spouse is neither legally obligated to support the children nor actually contributing to their support (Pet. App. 4a-5a, 10a-11a).

2. The stipulated facts in this case show that respondent is the mother of three minor children who have been receiving AFDC assistance from New Mexico since 1971. She is divorced from the children's natural father and has

remarried. Respondent's spouse has not adopted her children and, as their stepfather, is not legally obligated under New Mexico law to support them. For purposes of AFDC, the household consists of respondent, her three children, and her spouse. Neither respondent nor her spouse receives AFDC payments, and thus the "budget group" is comprised only of respondent's three children (Pet. App. 3a-4a, 7a-8a).

At all times relevant to this action, respondent was a full-time student who received no wages or pay of any kind. Respondent's spouse was also a full-time student. However, he received some income in the form of wages from a part-time job and a monthly check from the United States under the G.I. Bill. Respondent's spouse does not voluntarily or regularly provide support to respondent's children (Pet. App. 3a-4a, 7a-8a).

Through October 1976, New Mexico computed the AFDC grant for respondent's three children to be $163 per month. This was based on a need standard of $189 per month and an assistance grant of 86% of need. Since respondent and her children neither received nor were deemed to receive any income, there was no income reduction in the children's AFDC grant. However, on October 4, 1976, the State notified respondent that, effective November 1976, the AFDC grant for her three children would be reduced from $163 per month to $2 per month pursuant to a new regulation (H.S.S.D. § 221.832, *supra*) that treated one-half the income of respondent's spouse as being available to respondent.[2] At no time,

[2]The revised AFDC amount was computed by attributing to respondent one-half ($235.67) of the income ($471.34) of her spouse, subtracting $49 for respondent's maintenance and support, and deducting that result from the children's need standard of $189 per month. The AFDC grant was then calculated as 86% of that difference ($2.33), or $2 per month.

either before or after the State's notice to respondent that her children's AFDC grant was being reduced, did the State determine that the income of respondent's spouse was actually available to respondent or her children. Indeed, it is undisputed in this litigation that respondent's spouse did not voluntarily and regularly make available any of his income to meet the needs of respondent's children (Pet. App. 4a-5a, 8a).

3. On October 28, 1976, respondent filed this suit on behalf of herself and her three minor children in the United States District Court for the District of New Mexico. Respondent challenged the reduction of the AFDC grant to her children on the grounds that the New Mexico community-property regulation is inconsistent with 42 U.S.C. 602(a), 45 C.F.R. 233.20(a)(3)(ii)(D), and 45 C.F.R. 233.90(a), and therefore invalid under the Supremacy Clause, and that the state regulation is contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court, after preliminarily enjoining New Mexico from applying the challenged state regulation to respondent's children, granted summary judgment in favor of respondent on her Supremacy Clause claim and permanently enjoined the operation of the regulation to reduce the AFDC grant to her children (Pet. App. 1a-6a). On the State's appeal, the court of appeals unanimously affirmed in a per curiam opinion (*id.* at 7a-12a).

DISCUSSION

Under New Mexico's AFDC regulation regarding community property, a natural parent's community-property interest in the income of his or her spouse is considered as income available to the parent for the

support of his or her children. This regulation applies even though the spouse, as the children's stepparent, has no legal obligation under state law to provide support for the children and does not in fact contribute to their support. In our view, this treatment of income is inconsistent with federal AFDC requirements and is thus invalid under the Supremacy Clause.[3]

It is beyond dispute that New Mexico could not directly deem the stepparent's income to be available to the children in this case. Rather, federal law provides that, in the absence of proof of actual contributions, a child may be considered to have available the income only of a natural parent, an adoptive parent, or a stepparent ceremonially married to a natural or adoptive parent and legally obligated to furnish support under a state law of general applicability that requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. See 45 C.F.R. 233.90(a) (Pet. 5-6). See also 42 U.S.C. 602(a)(7);

---

[3]In addition to this federal issue, petitioner also presents (Pet. 2) two questions concerning the application of New Mexico's community-property regulation and the validity of that regulation under state law. We express no views on these issues of state law, and we assume for purposes of this submission that, as a matter of New Mexico law, the regulation is valid and was properly applied in this case. We do note that the New Mexico Supreme Court currently has before it a case that raises these questions of state law (as well as the federal issue presented in the instant case). *Harper* v. *New Mexico Department of Human Services*, No. 4392 (N.M. Ct. App.), certification to the New Mexico Supreme Court (Mar. 5, 1980) (Pet. Supp. App. 13a-14a). See also page 11, *infra*. Of course, the invalidity of New Mexico's AFDC regulation under state law would obviate the need to consider the validity of the regulation as a matter of federal law.

Van Lare v. *Hurley*, 421 U.S. 338 (1975); *Lewis* v. *Martin*, 397 U.S. 552 (1970); *King* v. *Smith*, 392 U.S. 309 (1968). Since the stepparent here is neither contributing to the children's support nor legally obligated to do so, his income cannot, as a matter of federal law, be considered by the State to be available to his stepchildren.[4]

New Mexico seeks to avoid this settled principle by treating a portion of the stepparent's income to be available to his spouse (the children's natural mother) under the State's community-property law and therefore derivatively available to the children. The State relies (Pet. 9, 11) on federal regulations to the effect that the available income of a parent legally responsible for support is considered to be available to the parent's minor children (45 C.F.R. 233.20(a)(3)(vi), Pet. 5; 45 C.F.R. 233.90(a), Pet. 6) and that income is considered available to the parent when he or she "has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance" (45 C.F.R. 233.20(a)(3)(ii)(D), Pet. 5).[5] In the State's view, the amount attributable to a natural parent "through [his or] her community income property rights" (Pet. 11) satisfies this standard of available income.

---

[4]Of course, any actual contributions by a stepparent to the support of his or her stepchildren could properly be considered in determining the children's AFDC eligibility or the amount of their assistance grant.

[5]Although 45 C.F.R. 233.20(a)(3)(ii)(D) refers to the income available to an AFDC "applicant or recipient," HEW has no separate regulation governing cases where, as here, the natural parent is not herself an applicant or recipient, (see page 4, *supra*), and in such cases the agency would look to 45 C.F.R. 233.20(a)(3)(ii)(D) in determining available income.

We disagree. Even assuming that state law entitles the natural parent to sue during the course of the marriage to obtain his or her share of the community property,[6] 45 C.F.R. 233.20(a)(3)(ii)(D) does not encompass inchoate legal causes of action as available income for purposes of AFDC. This interpretation is clearly established by the administrative history of the regulation. In 1973, HEW issued a Notice of Proposed Rulemaking to amend its regulations as follows:

> [N]et income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest therein and has the legal ability to make them available but does not do so.

38 Fed. Reg. 18254 (1973).[7] The Notice stated that the proposed amendment would "clarify that available income and resources include those which are available to the client, e.g., *through a legal interest in community property* or a trust, even though he does not secure them"

---

[6]The State has cited no authority that would permit one spouse to sue the other for his or her portion of the community property during the marriage.

[7]At the time of the proposed rulemaking, the existing provision stated:

> [O]nly such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

45 C.F.R. 233.20(a)(3)(ii)(*c*) (1973).

(*ibid.*; emphasis added). However, HEW subsequently modified the regulation to its current form in light of public comments that

> raised a valid criticism with respect to the interpretation of the phrase "currently available." The language of the regulation was clarified so that the reference regarding consideration of a legal interest in income or resources is *a reference to a liquidated sum and not to an uncollected judgment such as a child support order which has not been paid. The regulations were revised to recognize the distinction which exists between that which is actually available and those resources which exist only in the form of unliquidated legal causes of action.*

40 Fed. Reg. 30963, 30964 (1975) (emphasis added). Thus, based on the notice-and-comment procedure, and expressly to conform to the decisions of this Court (*ibid.*), the regulation as finally adopted was designed generally to exclude from available income "resources which exist only in the form of unliquidated legal causes of action," and particularly "income * * * available * * * through a[n inchoate] legal interest in community property."

Moreover, the State's construction of 45 C.F.R. 233.20(a)(3)(ii)(D)—that children's AFDC benefits may be reduced or even terminated simply because their natural parent can commence litigation to obtain his or her share of the community property—does not accord with the remedial purpose of the AFDC program. Such a view ignores the fact that substantial disagreements may be presented concerning the definition of community property and the amount of the natural parent's rightful

claim,[8] that litigation may remain pending for many years, that further proceedings may be necessary to enforce an initial judgment awarding community property to the natural parent, and that myriad other legal and practical difficulties may serve in fact to make the community-property interest unavailable as support. For these reasons, New Mexico's community-property regulation would allow needy and dependent children to be deprived of necessary AFDC funds that have not actually been replaced by any community-property income deemed to be available—precisely the evil sought to be avoided by the federal AFDC requirements and the decisions of this Court.

Finally, no conflict currently exists on this issue that warrants resolution by the Court. The position we urge is consistent with the only decision of which we are aware outside New Mexico that addresses the question. See *Camp* v. *Swoap*, 94 Cal. App. 3d 733, 156 Cal. Rptr. 600 (1979), in which the state court of appeals invalidated on Supremacy Clause grounds a California AFDC regulation that, like the New Mexico regulation at issue here, treated a natural parent's community-property interest in his or her spouse's income as available to support the natural parent's children. Cf. *Reyna* v. *Vowell*, 470 F. 2d 494, 496 (5th Cir. 1972) (Texas' attribution of income of minor child to parent cannot serve to reduce AFDC benefits to

[8]See, *e.g.*, *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979). We note that New Mexico recognizes as a matter of state law that income acquired during the marriage may be the separate income of the spouse rather than the community property of both spouses (Pet. App. 15a).

parent's other children unless such income is actually available for their support). Petitioner correctly observes (Pet. Supp. 2-4) that the intermediate appellate courts of New Mexico are divided on the validity of the State's community-property regulation. Compare *Barela* v. *New Mexico Department of Human Services*, No. 4059 (N.M. Ct. App. Oct. 30, 1979) (invalidating regulation), with *Duran* v. *New Mexico Department of Human Services*, No. 4350 (N.M. Ct. App. Mar. 4, 1980) (Pet. Supp. App. 1a-12a) (upholding regulation). However, the question has now been certified to the New Mexico Supreme Court. See *Harper* v. *New Mexico Department of Human Services*, No. 4392 (N.M. Ct. App.), certification to the New Mexico Supreme Court (Mar. 5, 1980) (Pet. Supp. App. 13a-14a). If that court determines that the community-property regulation is invalid under federal law, there will be no conflict requiring this Court's consideration. By the same token, if the New Mexico Supreme Court concludes that the regulation is invalid or was invalidly applied as a matter of state law (the issues raised in petitioner's first two "Questions Presented" in this case), there will again be no conflict on the federal question presented here. Finally, in the event that the court in *Harper* sustains the regulation as consistent with federal law, there will be time enough at that point to seek this Court's review of the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys

JOAN Z. BERNSTEIN
General Counsel

DONALD A. GONYA
Assistant General Counsel

RANDOLPH W. GAINES
JOHN B. WATSON
Attorneys
Department of Health, Education, and Welfare

APRIL 1980

DOJ-1980-04

Supreme Court, U.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

No. 79–907

IN THE

Supreme Court of the United States

October Term, 1979

LAWRENCE B. INGRAM, Secretary,
Department of Human Services of
New Mexico,

Petitioner,

v.

JACQUELINE NOLAN, *et al,*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S MEMORANDUM IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JEFF BINGAMAN
Attorney General of New Mexico

ROBERT N. HILGENDORF
Deputy Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

GORDON L. BERGMAN
Assistant Attorney General
Post Office Box 2348
Santa Fe, New Mexico 87501
(505) 827-2305

Attorneys for Petitioner

May 10, 1980

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	i
STATEMENT	1
DISCUSSION	2
CONCLUSION	6

TABLE OF CITATIONS

Cases

Harper v. New Mexico Department of Human Services, Income Support Division, Court of Appeals for New Mexico, No. 4392, certified March 15, 1980 to Supreme Court of New Mexico, No. 12,972	6
Hughes v. Hughes, 91 N.M. 339, 343, 573 P.2d 1194, 1198 (1978) . .	3, 4
King v. Smith, 392 U.S. 309 (1968).	2
McDonald v. Senn, 53 N.M. 198, 206, 204 P.2d 990 (1949)	2
Poe v. Seaborn, 282 U.S. 101 (1930)	3

(Cont.)

Federal Statutes and Regulations

	Page
Equal Credit Opportunity Act, as amended, 88 Stat. 1521 (1974), 15 U.S.C. §§ 1691–1691f. . .	3
Regulation B, 12 C.F.R. § 202.7(d) (3) [1977]	3
45 C.F.R. § 233.20(a) (3) (ii) (D)	4
38 Fed. Reg. 18254 (1973)	4
40 Fed. Reg. 30963, 30964 (1975)	5
40 Fed. Reg. 30963–30965 (1975)	4

Miscellaneous

§ 40–3–12.A N.M.S.A. 1978	2
"Equal Management of Community Property and Equal Credit Opportunity", Anne K. Bingaman, 13 Idaho Law Review 161, 164 (1977).	3

IN THE

Supreme Court of the United States

October Term, 1979

No. 79–907

LAWRENCE B. INGRAM, Secretary,
Department of Human Services of
New Mexico,

Petitioner,

v.

JACQUELINE NOLAN, *et al,*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S MEMORANDUM IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner files this memorandum in response to the brief filed by the Solicitor General for the United States as Amicus Curiae.

STATEMENT

In its Statement, the United States acknowledges that the Department of Health, Education, and Welfare ("HEW") had approved New Mexico's community property regulation at issue in this case, but that such approval "apparently did not contemplate a situation, such as is presented here. . ." (Amicus Brief, n. 1, at 1). This representation to the Court as to the nature and scope of the HEW approval depends on facts outside the record in this case and HEW should not be permitted to

introduce them in an Amicus Brief having chosen not to participate in the trial of these issues below.

The Petitioner also takes issue with HEW's attempt to minimize the importance of its approval of the community property regulation when it approved New Mexico's state plan on June 4, 1976. The United States argues that such approval does not "conclusively determine the validity of a State Plan under the AFDC program," citing the case of *King v. Smith,* 392 U.S. 309. (Amicus Brief, n. 1 at 1). However, the holding in *King v. Smith, supra,* was that agency approval of a state regulation which was judicially found to be in violation of a federal *statute* was not controlling. In the case at bar, the argument is whether a state regulation is contrary to another federal *regulation.* This involves an area in which federal agency action is to be given considerable weight. For HEW to now disavow that approval without offering any legal basis for its change in position is to put forth an argument which falls of its own weight.

DISCUSSION

I. HEW'S DISAVOWAL OF PETITIONER'S REGULATION IS FOUNDED ON A BASIC MISUNDERSTANDING OF COMMUNITY PROPERTY PRINCIPLES

The HEW brief demonstrates a nearly total lack of understanding of community property principles, and as a consequence its conclusions which depend on viewing those rights as "inchoate" are unsupportable in law. Under New Mexico community property law, income earned by respondent's spouse from wages or any other non-separate property source is community income,[1] to which each spouse has a legal one-half interest.[2] The theory behind such a division is that although the husband may

1 See § 40-3-12.A. N.M.S.A. 1978, set forth at Pet. 18a.

2 See *McDonald v. Senn,* 53 N.M. 198, 206, 204 P.2d 990 (1949).

perform the work which generates the wage income, the wife performs household duties which permit him to leave the house and earn the income. As such the wage income is not "his" income except to the extent of his one-half interest created by operation of law.[3]

The interest created in each spouse is incorrectly described by HEW as "inchoate legal causes of action." (Amicus Brief, p. 8.) This suggests that a wife in the circumstances described above can make her husband's wages available to her only by bringing an action in court, like a child support action. Although that option might be available to a spouse in unusual circumstances, the common way in which a spouse makes use of community income is through use of checking accounts, credit cards, and direct sharing of income. With the advent of the federal Equal Credit Opportunity Act,[4] and implementing Regulation B, 12 C.F.R. § 202.7(d) (3),[5] when an unemployed wife in an equal management community property state, such as New Mexico, applies for unsecured credit, the creditor cannot request her husband's signature on a note or loan application if the community itself is credit worthy. As one commentator has described it,

> "Thus, for the first time, wives in equal management community property states have been put on a truly equal footing with their husbands. Through the creation of debts which bind the community property, wives may manage community property independently of their husbands' consent or cooperation."[6]

3 See *Hughes v. Hughes,* 91 N.M. 339, 343, 573 P.2d 1194, 1198 (1978). In accord, see *Poe v. Seaborn,* 282 U.S. 101, 113 (1930).

4 Equal Credit Opportunity Act, as amended, 88 Stat. 1521 (1974), 15 U.S.C. §§ 1691-1691f.

5 Regulation B, 12 C.F.R. § 202.7(d) (3) [1977].

6 "Equal Management of Community Property and Equal Credit Opportunity", Anne K. Bingaman, 13 Idaho Law Review 161, 164 (1977).

Thus, Mrs. Nolan's interest in the community income is available to her and is not an "inchoate" right as a practical matter. Furthermore, at law her interest is not inchoate but present, vested, and equal to her husband's interest.[7] Her interest as a wife in New Mexico is more than a "mere expectancy."[8]

2. THE ADMINISTRATIVE HISTORY SUPPORTS PETITIONER'S CONSTRUCTION OF ITS COMMUNITY INCOME REGULATION NOTWITHSTANDING THE UNITED STATES' MISQUOTATION OF THAT HISTORY

In HEW's attempt to derive support for their position from the administrative history of 45 C.F.R. § 233.20(a) (3) (ii) (D), they misquote and misconstrue the language of that history. HEW proposed a regulation which had as its express purpose the clarification of the definition of income to include a "legal interest in community property or a trust, even though he does not secure them."[9] Later HEW modified the language of that regulation by adding the word "liquidated," and eliminating the phrase "but does not do so."[10] In effect, HEW was modifying the regulation so as to exclude causes of action which might not result in actual income. In explanation of those changes, HEW indicated that they did not intend to include income which is in the form of an "unliquidated legal cause of action," giving the example of a child support order which had not been paid. Nowhere in the explanation is there any suggestion that interests in community property or trusts were to be treated any differently under the revised language than under the original language.

---

7 Note 3, *supra.*
8 Ibid.
9 Amicus Brief, pp. 8-9; See 38 Fed. Reg. 18254 (1973).
10 See 40 Fed. Reg. 30963-30965 (1975).

Specifically, the United States' Amicus Brief misquotes that administrative history in the following paragraph:

> Thus, based on the notice-and-comment procedure, and expressly to conform to the decisions of this Court (*ibid.*), the regulation as finally adopted was designed generally to exclude from available income "resources which exist only in the form of unliquidated legal causes of action," and particularly "income *** available *** through a[n inchoate] legal interest in community property." [Amicus Brief, p. 9].

The citation "*ibid.*" following the word "Court" suggests that the preceding phrase is a quotation, which it is not. The first phrase in quotation marks, "resources which exist . . . action," although not cited, is found at Section 6 of 40 Fed. Reg. 30963, 30964 (1975). The full text of Section 6 is as follows:

> 6. Changes in the definitions of "currently available" income and resources are contrary to federal court decisions affirmed by the U.S. Supreme Court and are unnecessarily punitive and open to subjective interpretation.
>
> Response: The comments raised a valid criticism with respect to the interpretation of the phrase "currently available". The language of the regulation was clarified so that the reference regarding consideration of a legal interest in income or resources is a reference to a liquidated sum and not to an uncollected judgment such as a child support order which has not been paid. The regulations were revised to recognize the distinction which exists between that which is actually available and those resources which exist only in the form of unliquidated legal causes of action.

A reading of Section 6 reveals that the language placed in quotation marks by the United States in its brief, viz. "income . . . available . . . through a[n inchoate] legal interest in

community property," is not found in this section of the administrative history *at all.* For the United States to connect this quoted language with the word "particularly" and to fail to include citations which would distinguish the two phrases, is to engage in highly improper argument.

This is an attempt by the United States to turn around the administrative history, which on its face is supportive of the petitioner's argument that "income" includes community property interests, so as to make it appear that the United States, in fact, attempted to exclude community property interests from its definition of income. Because this argument is the focal point of the Amicus Brief, the Petitioner submits that the Court should reject the Amicus argument in its entirety. Given the deference that this Court generally gives to opinions of agencies with regard to the meaning of their own regulations, it is imperative that an argument which is premised on such substantial error not be accepted by this Court.

CONCLUSION

The state of New Mexico reiterates its request that this Court accept its petition for certiorari, or at least postpone consideration of it until all appeals are taken from the case of *Harper v. New Mexico Department of Human Services,*[11] now pending in the New Mexico Supreme Court.

---

11 *Harper v. New Mexico Department of Human Services, Income Support Division,* Court of Appeals for New Mexico, No. 4392, certified March 15, 1980 to Supreme Court of New Mexico, No. 12,972. Oral arguments before the New Mexico Supreme Court were held May 7, 1980.

Respectfully submitted,

JEFF BINGAMAN
Attorney General of New Mexico

ROBERT N. HILGENDORF
Deputy Attorney General
P. O. Drawer 1508
Santa Fe, New Mexico 87501

GORDON L. BERGMAN
Assistant Attorney General
P. O. Box 2348
Santa Fe, New Mexico 87501
(505) 827-2305

Attorneys for Petitioner

May 10, 1980